

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

Cortec Mining Kenya Limited, Cortec (Pty) Limited and Stirling Capital Limited

v.

Republic of Kenya

(ICSID Case No. ARB/15/29)

PROCEDURAL ORDER NO. 5 ON DOCUMENT PRODUCTION

Members of the Tribunal

The Honourable Ian Binnie CC, QC, President

Mr. Kanaga Dharmananda SC, Arbitrator

Professor Brigitte Stern, Arbitrator

Secretary of the Tribunal

Ms. Aïssatou Diop

5 May 2017

IN THE MATTER OF AN ARBITRATION

ICSID Case No. ARB/15/29

UNDER THE ICSID RULES

B E T W E E N:

CORTEC MINING KENYA LIMITED

1CORTEC (PTY) LIMITED

STIRLING CAPITAL LIMITED

Claimants

-and-

THE REPUBLIC OF KENYA

Respondent

CLAIMANTS' REQUEST FOR PRODUCTION OF DOCUMENTS DATED 9 FEBRUARY 2017

1. INTRODUCTION

- 1.1 The Republic of Kenya (the **State**) is hereby requested to produce the Documents described below to Cortec Mining Kenya Limited, Cortec (Pty) Ltd and Stirling Capital Limited (together, the **Claimants**).

1.2 The Claimants make these document requests in accordance with the Tribunal's procedural orders, including the timetable set out at Annex A to the Tribunal's Procedural Order No. 3 dated 6 June 2016.

2. **KEY TERMS AND EXPRESSIONS**

2.1 The following terms as used in this Claimants' Request for Production of Documents shall have the meaning ascribed to them below. All other capitalised terms used but not defined in this Request shall have the meaning ascribed to them in the Claimants' Memorial of Claim or the Claimants' Counter-Memorial on Preliminary Objections (as defined below).

- (a) "**CI**" means the Claimants.
- (b) "**Claimants' Counter-Memorial on Preliminary Objections**" means the Claimants' Counter-Memorial on Preliminary Objections dated 25 January 2017.
- (c) "**Claimants' Memorial of Claim**" means the Claimants' Memorial of Claim dated 5 May 2016.
- (d) "**CMK**" means Cortec Mining Kenya Limited.
- (e) "**Cortec UK**" means Cortec (Pty) Ltd.
- (f) "**DMG**" means the Department of Mines and Geology.
- (g) "**Documents**" has the meaning set out in Article 1 of the International Bar Association Rules on the Taking of Evidence in International Commercial Arbitration, provided that the term is interpreted included any writing, text, image, recording or information responsive to the following Requests, including any agreements, internal and external correspondence (including email), drafts, presentations, memoranda, meeting minutes, reports, studies, analyses, records and personal notes (including diaries and calendars), in any form or medium, including electronic or software formats, and in any language.
- (h) "**DPR**" means document production request.
- (i) "**KFS**" means the Kenya Forest Service.
- (j) "**Mining Investment Road Map**" means the document at Exhibit C-61.

- (k) "**NEMA**" means the National Environment Management Authority.
- (l) "**NMK**" means National Museums of Kenya.
- (m) "**PMLC**" means the Prospecting and Mining Licensing Committee.
- (n) "**Relevant Government Agencies**" means the DMG, the KFS, NEMA, NMK, Ministry of Mining, Ministry of Environment and Natural Resources, Ministry of Environment and Mineral Resources and the Ministry of Forestry and Wildlife (and, as applicable, their predecessors or successors).
- (o) "**Relevant Period**" means the period from 1 January 2007 until 31 December 2013, unless otherwise specified.
- (p) "**State's Counter-Memorial**" means the State's Counter-Memorial on Merits and Memorial on Objections to Jurisdiction dated 5 October 2016.
- (q) "**Stirling**" means Stirling Capital Limited.
- (r) "**Task Force**" means the State's Task Force on Review of Prospecting, Exploration and Mining Licenses and Agreements established on 7 August 2013.
- (s) "**WS**" means witness statement.

2.2 With regard to certain requests herein, in order to clarify what is referred to, citations are given to relevant statements by the parties or relevant exhibits to those statements. Such citations should not be construed to limit the relevance of such requests.

3. **CASE SUMMARY**

3.1 The Claimants' case on jurisdiction and liability is set out in the Claimants' Memorial of Claim and the State's case is set out in the State's Counter-Memorial. The Claimants have also responded to the State's case through their Counter-Memorial on Preliminary Objections. However, in order to assist the tribunal in making orders on the parties' respective Request to Produce, a short summary of the parties' pleaded cases is set out below. Please note that the summary below is for convenience only and is not intended to limit or modify the Claimants' case as pleaded.

The Claimants' case

- 3.2 Between 2007 and 2013, CMK, Stirling and Cortec UK spent millions of dollars exploring and defining a niobium and rare earth elements (**REEs**) resource at Mrima Hill. The Claimants conducted their business in Kenya primarily through CMK. In addition to their financial contributions and expenditure, and their equity in CMK, the Claimants' investments in Mrima Hill include (or included) the principal licences granted to CMK by the State (SPL 256 and SML 351) and the intellectual property rights over the drilling data, feasibility studies and other technical information for the Mrima Hill project created or owned by the Claimants. The Claimants and their investments qualify for protection under the UK-Kenya BIT and the ICSID Convention.¹
- 3.3 Through their Toronto-listed parent company Pacific Wildcat Resources Corp (**PAW**), on 29 July 2013 the Claimants announced that CMK had discovered "*a world class deposit*" of niobium and REEs. A week later, on 5 August 2013, the State revoked CMK's special mining licence for Mrima Hill (SML 351). The revocation was conducted by way of a press conference followed with a 'tweet' from the Ministry of Mining.
- 3.4 The Claimants' position is that the revocation of SML 351 constituted a breach of the State's obligations under the UK-Kenya BIT. Specifically, the State breached its obligations by (i) expropriating the Claimants' investments (including but not limited to SML 351) in violation of Article 5 of the UK-Kenya BIT and (ii) treating the Claimants' investments in a manner that violated Article 2(2) of the UK-Kenya BIT.
- 3.5 As part of their expropriation claim, the Claimants contend that, in conducting the revocation of SML 351, the State did not act for a *bona fide* public purpose, did not act on a non-discriminatory basis and did not pay compensation to the Claimants. The Claimants also contend that the State's expropriation was unlawful because the State failed to afford the Claimants due process (which is a condition of a lawful expropriation under the MFN clause of the BIT and international law) and that the unlawfulness of the expropriation was aggravated by the fact that the State official who conducted the taking – the Cabinet Secretary for Mining, Najib Balala (**CS Balala**) – attempted to solicit a bribe to refrain from revoking SML 351. The Claimants also contend that the expropriation of the Claimants' investments was part of a plan to nationalise Mrima Hill and a broader policy of "resource nationalism" in Kenya.
- 3.6 As part of their FET claim, the Claimants contend that the treatment they received from various State officials and authorities was arbitrary, unreasonable, discriminatory, and lacking in transparency. Further, by issuing and approving CMK's licences and acquiescing in the Claimants' activities at Mrima Hill, the State frequently affirmed the legality of the Claimants' investments. Indeed, the State also made positive representations to the Claimants that it supported the Claimants' investments in Mrima Hill. Such representations and

¹ While there is no requirement in the UK-Kenya BIT for the Claimants to have complied with Kenyan law in order to have investments capable of protection under the UK-Kenya BIT, the Claimants' case is that they complied at all material times with Kenyan law requirements. The Claimants' full argument on this point is set out in the Claimants' Counter-Memorial on Preliminary Objections.

approvals generated legitimate expectations on the part of the Claimants, namely that they held valid and enforceable mining rights to Mrima Hill. The Claimants have reserved their right to argue that the State is estopped (or barred by principles of preclusion or acquiescence) from denying that valid and enforceable mining rights were granted to the Claimants in respect of Mrima Hill.

- 3.7 The Claimants have reserved their rights as to the quantum of their claim and further evidence (including expert evidence) will be adduced during the quantum phase of this arbitration. Notwithstanding this reservation, the Claimants submitted evidence regarding quantum along with the Claimants' Memorial of Claim supportive of a claim for *damnum emergens* in excess of US\$ 50 million and *lucrum cessans* in excess of US\$ 1 billion.

The State's case

- 3.8 The following summary reflects the Claimants' understanding of the State's case: if the State disagrees with the summary below, the State is welcome to provide any necessary clarifications.

- 3.9 The State's case on jurisdiction is as follows²:

3.9.1 The Claimants failed to comply with the notice requirements of Article 8(3) of the UK-Kenya BIT and so the Tribunal has no jurisdiction to hear the Claimants' claims.

3.9.2 The Tribunal has no jurisdiction *ratione materiae* over the Claimants' claims because the Claimants' investments do not comply with Kenyan law. In making this objection, the State has put the interpretation of the BIT in issue – namely by arguing that there is an "implicit" requirement that investments conform to or comply with Kenyan law. Amongst other things, the State alleges that the Claimants failed to:

- (a) obtain a valid prospecting right;
- (b) obtain a valid prospecting licence;
- (c) obtain a valid mining licence;

² For the avoidance of doubt, in summarising the State's arguments and allegations, the Claimants make no admission as to the strength or veracity of those arguments or allegations. This summary is provided without prejudice to the Claimants' pleadings.

- (d) obtain other necessary approvals from Relevant Government Agencies, such as NEMA and the PMLC; and
- (e) have the required level of local equity participation in CMK.

(the **State's Illegality Objection**).

- 3.9.3 The Tribunal has no jurisdiction *ratione materiae* over the Claimants' claims because the Claimants' investments were allegedly procured through corrupt activities perpetrated by one of the Claimants' investors, Mr Juma, and the former Commissioner of Mines and Geology, Moses Masibo. The State also questions the conduct of other State officials, including Benjamin Langwen (Director of Compliance and Enforcement at NEMA). The State alleges that there was a "*plethora of red flags*" that should have alerted the Claimants to the alleged corrupt activity and/or which prove that the Claimants engaged in wrongdoing (the **State's Corruption Objection**). As part of the State's Corruption Objection, the State alleges that the Claimants were not good faith investors.
- 3.9.4 The Tribunal has no jurisdiction *ratione materiae* over the Claimants' claims because the Claimants' investments do not comply with the requirements of Article 25 of the ICSID Convention or the so-called "*Salini test*" (the **State's Salini Objection**). The State's *Salini* Objection is focused on an alleged failure by the Claimants to make a long-term commitment that provided a durable economic benefit to the State and the absence of financial contributions by the Claimants (and related arguments concerning the origin of capital).
- 3.9.5 The Tribunal has no jurisdiction *ratione personae* over the Claimants' claims because of various alleged deficiencies in the corporate personalities and/or corporate histories of the Claimants (the **State's Corporate Objection**).
- 3.10 The State also brings what it describes as an objection to the admissibility of the Claimants' claim. However, other than in relation to the alleged failure of the Claimants to satisfy the "cooling off" period under the BIT, the State has not particularised its admissibility objection (which it simply pleads as an alternative to its objection to jurisdiction).
- 3.11 The State's defence on the merits is as follows:
 - 3.11.1 The State repeats the State's Illegality Objection, the State's Corruption Objection, the State's *Salini* Objection and the State's Corporate Objection to argue that there was no investment capable of expropriation or entitled to FET protection under the BIT;
 - 3.11.2 SML 351 was "*merely suspended*" and not revoked or, alternatively, SML 351 was revoked lawfully or was *void ab initio*;

3.11.3 The Claimants were not treated in an unlawful, discriminatory, arbitrary or unfair manner and the Claimants instead failed to avail themselves of the due process offered by the State through the Task Force; and

3.11.4 The Claimants' expectations were not "*legitimate*" and the State did not make binding or authorised representations that were relied upon by the Claimants regarding the State's support for the Claimants' investments (or if the State did make representations to the Claimants, the Claimants reliance on the relevant representations was not reasonable).

3.12 As to quantum, the State disputes the Claimants' preliminary case and instead adduces the expert report of Dr Rigby in support of its argument that the Claimants are not entitled to any damages (the **State's Quantum Case**).

4. **REQUEST TO PRODUCE**

4.1 The State is asked to produce high-resolution, colour photocopies and high-resolution electronic scans of the Documents requested below. The Claimants reserve their right to request that original copies of Documents be provided for physical inspection.

4.2 For each of the Documents requested, the State is asked to produce all responsive documents within its possession, custody or control. For the avoidance of doubt, such documents include any Document that is in the possession, custody or control of any other person and that the State is entitled, legally, contractually or otherwise, to obtain upon request, in the original or in copy form.

4.3 The Claimants confirm that, to the best of their knowledge and belief, none of the Documents requested below are in their possession, custody or control.

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No.	Req. Party	Documents or Category of Documents Requested By Claimants	Relevance and Materiality According to Requesting Party		Responses/ Objections to Document Request	Reply to Objections to Document Requests	Tribunal's Decision
			Reference to Submissions	Comments			
I. General							
a. Company documents							
1.	CI	A complete copy of the file created and maintained by the Kenyan companies registry for CMK.	As part of the State's Corporate Objection, the State has produced two incomplete share transfer forms (Exhibits R-156 and R-157), which it claims are from the Registrar of Companies in Kenya, to allege that Cortec UK and Stirling are not shareholders of CMK and that CMK, therefore, cannot satisfy the requirements of Article 8(2) of the UK-Kenya BIT (State's Counter-Memorial, paras 342, 350-352).	<p>The requested Documents in CMK's company file are relevant and material to the State's Corporate Objection, in which the State has put the ownership and control of CMK in issue; as documents in CMK's company file record dealings in CMK's shares, the company file is also of broader relevance and materiality to the issue of jurisdiction <i>ratione materiae</i> (shares in CMK being one of the classes of the Claimants' "investments" under the BIT).</p> <p>The Claimants have made attempts to obtain a copy of CMK's company file at the Kenyan companies registry</p>	The State agrees to undertake reasonable searches for the requested Documents and will produce all responsive Documents that are in the State's custody, possession or control.	Noted. At this stage no order from the Tribunal is required.	As this request has been withdrawn no order will be made at this time.

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				and have been advised that the file is missing (see Exhibit C-284). From the fact that the State has exhibited these two incomplete share transfer forms (Exhibits R-156 and R-157), it appears that the State is in possession of some or all of CMK's company file. The State should be ordered to produce the full CMK company file so that the parties are on an equal evidentiary footing <i>vis-a-vis</i> the State's Corporate Objection specifically and the issue of jurisdiction <i>ratione personae</i> more generally.			
b. UK-Kenya BIT							
2.	CI	Documents in the State's custody, possession or control recording or reflecting the negotiations	In its objections to jurisdiction, the State has put into issue the interpretation of the	The <i>travaux préparatoires</i> to the BIT are relevant to the State's Illegality	The State agrees to undertake reasonable searches for the requested Documents	Noted. At this stage no order from the Tribunal is	As this request has been withdrawn no order will be made at

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		between the State and the Government of the United Kingdom that led to the <i>Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Kenya for the Promotion and Protection of Investments</i> signed in Nairobi on 13 September 1999.	BIT. Specifically, in the State's Illegality Objection, the State has argued that the BIT contains an implied requirement of compliance or conformity with the law of the host State (State's Counter-Memorial, paras 206-211). In making this argument, the State has relied on <i>Inceysa v El Salvador</i> , in which case the tribunal referred to the <i>travaux préparatoires</i> of the applicable BIT (State's Counter-Memorial, para 206.2). The Claimants have argued there is no basis for implying a legality requirement into the UK-Kenya BIT (see Section B of the Claimants' Counter-Memorial).	Objection as pleaded.	and will produce all responsive Documents that are in the State's custody, possession or control.	required.	this time.

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II. Rights and licences							
a. Special Prospecting Licence No. 256							
3.	CI	Documents that record or reflect the DMG reviewing, considering or processing the application for a prospecting licence filed by CMK on 22 May 2007.	As part of the State's Illegality Objection, the State has alleged that CMK was " <i>incapable of acquiring a valid prospecting licence</i> " (State's Counter-Memorial, para 62) because Prospecting Right 8258 was not issued in CMK's name. The State also challenges the inclusion of Mrima Hill in SPL 256 (as initially granted). The State quotes a letter from	The requested Documents are relevant and material to the State's Illegality Objection ³ . The State has alleged that Prospecting Right 8258 was not issued to CMK and that, as a result, CMK could not acquire a valid prospecting licence or a valid mining licence. These documents will show the extent to which the State considered Prospecting Right 8258 in the process of granting SPL 256, which will in turn be relevant to the State's wider argument concerning the	The State's awareness of any failure by CMK to comply with Kenyan law in relation to its application for a prospecting licence will not be determinative of the question of whether CMK did in fact fail to comply with Kenyan law. That question is subject to an objective test, and the State's subjective state of awareness or otherwise of the	It is not credible for the State to contend that " <i>the State's subjective state of awareness or otherwise of the legality of CMK's application is not relevant</i> ". The State's Illegality Objection is premised on a wide range of allegations, including that certain of its officials knowingly violated Kenyan	Consideration by the Kenya Department of Mines and Geology (DMG) of the application for the Special Prospecting Licence No. 256 [SPL 256] is relevant in relation to the matters subsequently identified by the Respondent as grounds for the revocation of SPL 256. This includes interactions with the National Environmental

³ For the avoidance of doubt, the Claimants do not admit that there is any legality requirement in the UK-Kenya BIT and maintain their arguments set out at Section B of the Claimants' Counter-Memorial on Preliminary Objections. The relevance and materiality of documents requested in relation to the State's Illegality Objection is therefore made in the context of the Claimants' position that, in any event, their investment *were* compliant with Kenyan law as set out at Section C of the Claimants' Counter-Memorial on Preliminary Objections.

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			Commissioner Biwott to CMK (Exhibit R-066) to suggest that Mrima Hill is not included in SPL 256 as CMK " <i>are going to be considered for a free area of approximately 1180km², excluding the Mrima Hill Nature Reserve</i> " (State's Counter-Memorial, paras 61, 64-65). But despite this comment by Commissioner Biwott, CMK was granted SPL 256 for an area that included Mrima Hill.	validity of SML 351.	legality of CMK's application is not relevant to the determination of that issue. Accordingly this ground for the Claimants' document request is also rejected. However, to the extent that such Documents would record the inclusion or otherwise of Mrima Hill within SPL 256 (as initially granted), the State agrees to undertake reasonable searches for the requested Documents and will produce all responsive Documents that are in the State's custody, possession	law for personal gain at various points in time prior to and including the issuance of SML 351. The State's case on illegality may include components to which an objective test applies, but the State's case also unquestionably includes components that are subject to a subjective test (either solely or in addition to the objective measure). There is also the obvious point that it would be grossly unfair for the State to be able to make allegations about	Management Authority (NEMA) and the authorities responsible for forest reserves, nature reserves and national monuments in the Mrima Hill area. To the extent consideration was given to these matters by the DMG in considering the application filed by CMK on 22 May 2007, such documents are to be produced. DRP is GRANTED in part.

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					or control.	<p>what the Claimants <i>should have known</i> without the State having to produce documents that will show what its own officials <i>actually knew</i>.</p> <p>Accordingly, the State is requested to produce <i>all</i> documents responsive to this DPR, not just those the State has agreed to produce.</p>	
4.	CI	A list of all of the members of the Prospecting and Mining Licensing Committee (PMLC) in the Relevant Period.	As part of the State's Illegality Objection, the State places great emphasis on the role and deliberations of the PMLC (see, for example, State's Counter-Memorial, paras 123-125, where the State describes the	<p>This document is relevant and material to the State's Illegality Objection.</p> <p>Specifically, this document is needed to contextualise the State's reliance on the PMLC and to show which State officials were involved in the processing</p>	<p>There are no Documents that are responsive to this document request.</p> <p>The PMLC is not comprised of permanent members; members are appointed on an ad</p>	Noted. At this stage no order from the Tribunal is required.	As this request has been withdrawn no order will be made at this time.

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			<p>PMLC meeting of 31 January 2013 and the discussion that occurred between the members regarding SPL 256; see also RWS-1 Njeru, para 8, which notes "<i>the PMLC sat usually every quarter and was responsible for reviewing all applications for mining concessions. The PMLC comprised members from the Ministry as well as other government agencies responsible for sanctioning mining projects such as the Kenya Forest Service and National Environmental Management Authority. The purpose of the PMLC was to provide appropriate checks and balances to ensure that</i></p>	<p>of CMK's various licence applications.</p> <p>It is also needed to test the State's (unsubstantiated) claims regarding the composition and importance of the PMLC.</p>	<p>hoc basis from the various Government departments. Therefore a list of all members of the PMLC does not exist.</p> <p>The State has agreed to produce official minutes of the PMLC under the Claimants' DPR 7 and these minutes will indicate the ad hoc members in attendance at each meeting of the PMLC.</p>		

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			<i>licences were issued properly</i> "; see also RWS-1 Mutiso, para 7, where the witness states that " <i>the PMLC had the important function of ensuring that applications for mining licences were being considered properly and only granted where there was full compliance with the law</i> ").				
5.	CI	Documents that record the establishment, mandate/terms of reference, objectives, operating procedures and protocols of the PMLC during the Relevant Period.	As part of the State's Illegality Objection, the State places great emphasis on the role and deliberations of the PMLC (see, for example, State's Counter-Memorial, paras 123-125, where the State describes the PMLC meeting of 31 January 2013 and the discussion that occurred	The requested Documents are relevant and material to the State's Illegality Objection. Specifically, these Documents are needed to test the State's (unsubstantiated) claims regarding the composition, purpose and importance of the PMLC.	The State agrees to undertake reasonable searches for the requested Documents and will produce all responsive Documents that are in the State's custody, possession or control.	Noted. At this stage no order from the Tribunal is required.	As this request has been withdrawn no order will be made at this time.

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			<p>between the members regarding SPL 256; see also RWS-1 Njeru, para 8, which notes "<i>the PMLC sat usually every quarter and was responsible for reviewing all applications for mining concessions. The PMLC comprised members from the Ministry as well as other government agencies responsible for sanctioning mining projects such as the Kenya Forest Service and National Environmental Management Authority. The purpose of the PMLC was to provide appropriate checks and balances to ensure that licences were issued properly</i>"; see also RWS-1 Njeru, para 7,</p>	<p>These Documents are also relevant and material to the State's wider contention that SML 351 was "irregular". For there to be "irregularity", there must be shown to have been a regular or standard operating procedure and process, including at the level of the PMLC.</p>			

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				where the witness states that " <i>the PMLC had the important function of ensuring that applications for mining licences were being considered properly and only granted where there was full compliance with the law</i> ").			
6.	CI	Documents, including (but not limited to) minutes, notes and other records of the meeting of the PMLC on 17 October 2007.	As part of the State's Illegality Objection, the State challenges the inclusion of Mrima Hill in SPL 256 (as initially granted). The State quotes a letter from Commissioner Biwott to CMK (Exhibit R-066) to suggest that Mrima Hill was not included in SPL 256 (State's Counter-Memorial, paras 61, 64-65). In Commissioner	The requested Documents are relevant and material to the State's Illegality Objection. Specifically, they will show the extent to which the inclusion of Mrima Hill in the area sought by CMK was debated at this PMLC meeting and, if it was, the conclusions that were reached by the PMLC.	The State objects to the production of the requested Documents on the basis that the scope of the request is unreasonably broad. The burden on the State to identify and produce all " <i>documents, including...minutes, notes and other records of the meeting</i> " is disproportionate.	This DPR is not too broad: it seeks documents related to a single meeting on a single day. Given the narrow scope of the request, the burden on the State is proportionate to the relevance and materiality of the requested Documents.	It is uncontested that a meeting of the PMLC was held on 17 October 2007 and that CMK's application for a special licence was deferred. The Respondent has agreed to produce the official minutes of that meeting. However, if the files of the PMLC contain other notes and records relevant to

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			<p>Biwott's letter (Exhibit R-066), reference is made to a meeting of the PMLC on 17 October 2007 at which the PMLC "<i>deferred</i>" CMK's "<i>application for a special licence over a free area of approximately 650 sq.km in Kwale District for lack of written consents from the landowners and the Kwale County Council</i>".</p> <p>But SPL 256 was ultimately issued for an area that included Mrima Hill.</p>		<p>However, the State agrees to undertake reasonable searches for the official minutes of the meeting of the PMLC on 17 October 2007 and will produce any such Document that is in the State's custody, possession or control. These Documents have been redacted to remove sections that are unrelated to CMK and/or Mrima Hill and are confidential.</p>	<p>The Claimants maintain their request for Documents responsive to this DPR.</p>	<p>that meeting including notes or documents reflecting discussions or other inputs to the CMK application, and such other documents are in the possession, control or custody of the PMLC relating to the meeting of 17 October 2007, such documents together with the official minutes are to be produced.</p> <p>DPR is GRANTED in part.</p>
7.	CI	Documents recording or reflecting discussions between members of the PMLC in relation to CMK's application for a <i>prospecting</i> licence over Mrima Hill (and CMK's	As part of the State's Illegality Objection, the State places great emphasis on the role and deliberations of the PMLC (see, for example, State's	<p>The requested Documents are relevant and material to the State's Illegality Objection.</p> <p>Specifically, these Documents will record the</p>	<p>The State objects to the production of the requested Documents on the basis that the scope of the request is unreasonably broad. The burden on</p>	<p>This request is not too broad. It is for Documents relating to a single licence that was issued on a known date and renewed twice on</p>	<p>In light of the Respondent's position that the licensing of the Claimants in respect of the Mrima property was illegal</p>

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		applications for renewal of SPL 256).	Counter-Memorial, paras 123-125, where the State describes the PMLC meeting of 31 January 2013 and the discussion that occurred between the members regarding SPL 256; see also RWS-1 Njeru, para 8, which notes " <i>the PMLC sat usually every quarter and was responsible for reviewing all applications for mining concessions. The PMLC comprised members from the Ministry as well as other government agencies responsible for sanctioning mining projects such as the Kenya Forest Service and National Environmental Management Authority. The purpose of the</i>	concerns (if any) that were expressed regarding the strength of CMK's application for a prospecting licence and the extent (if any) to which legal impediments to the issuance of SPL 256 (or any subsequent renewal) were raised by or between PMLC members. They will also reveal which members of the PMLC were most actively involved in the processing of CMK's licence application (and renewals) and which members have the best evidence to give before the Tribunal on these matters.	the State to identify and produce all " <i>documents recording or reflecting discussions between members of the PMLC</i> " is disproportionate. The basis for the Claimants' request is that these Documents would record " <i>concerns</i> " regarding CMK's prospecting licence application. If there were any concerns regarding the strength of CMK's application for a prospecting licence over Mrima Hill/and any renewal thereof, the State contends that such issues would be addressed in the official minutes of	known dates. Nor is this DPR disproportionate: SPL 256 is a major part of the State's Illegality Objection. The State argues the invalidity of SPL 256 deprives the Tribunal of jurisdiction (State's Counter-Memorial, para 219). The State cannot plead an issue on the basis that it brings an end to the proceedings and then deny the materiality of that issue to evade an obligation to produce documents that relate to it. Further, it is	at Kenya law, the Claimants are entitled to production of documents in the possession, custody or control of the PMLC reflecting discussions amongst members of the PMLC in relation to CMK's application for a renewal of SPL 256 prior to its issuance and when renewal was being considered from time to time by the PMLC. The production order is not limited to official minutes. On the other hand the order for production does not extend beyond material presently in the custody of the PMLC.

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			<p><i>PMLC was to provide appropriate checks and balances to ensure that licences were issued properly"; see also RWS-1 Mutiso, para 7, where the witness states that "the PMLC had the important function of ensuring that applications for mining licences were being considered properly and only granted where there was full compliance with the law").</i></p>		<p>the PMLC meetings. Further, the official minutes would confirm the members of the PMLC "<i>that were most actively involved in the processing of CMK's licence application</i>".</p> <p>The State agrees to undertake reasonable searches for official minutes of the PMLC produced during the Relevant Period and which address CMK's application for a prospecting licence over Mrima Hill/and any renewal thereof, and will produce such Documents that are in the State's custody, possession or control.</p>	<p>unsatisfactory for the State to "<i>contend</i>" that the information in the requested Documents "<i>would be addressed in the official minutes of the PMLC meetings</i>". The Claimants have no way of testing this contention. The State's suggestion that the official minutes of the PMLC meetings would include this information is hard to square with the State's fresh characterisation of the PMLC as an <i>ad hoc</i> body. If the PMLC really is the <i>ad hoc</i> body the State describes, then discussions</p>	<p>DPR is GRANTED in part.</p>

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						<p>between members of the PMLC may well take place outside PMLC meetings and may therefore be recorded in documents other than official PMLC minutes.</p> <p>The Claimants maintain this DPR in full.</p>	
8.	CI	The "memorandum" prepared by Commissioner Masibo to be presented at the PMLC meeting on 31 January 2013.	Relying on the minutes of the PMLC meeting of 31 January 2013 (Exhibit R-014), the State alleges that Commissioner Masibo prepared a memorandum for the PMLC meeting on 31 January 2013 (State's Counter-Memorial, para 123), and that the "issue of irregularities	<p>This document is relevant and material to the State's Illegality Objection, as it is said to relate to the validity of SPL 256 and the circumstances in which it was issued.</p> <p>This document is also relevant and material to the State's Corruption Objection, as (according to Mr Mutiso) it relates to the</p>	The issue of whether SPL 256 did comply with Kenyan law is subject to an objective test, and Commissioner Masibo's subjective state of mind as to the standing of SPL 256 is not relevant to the determination of that issue. Accordingly this	The Claimants disagree with the State's objections, but at this stage no order from the Tribunal is required.	As the request is withdrawn no order is required.

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			<p><i>surrounding SPL 256 was discussed</i>" at that meeting (RWS-1 Mutiso, para 15). According to the State's witness Mr Mutiso, this memorandum <i>"reasoned"</i> that <i>"SPL 256 was irregularly issued and a recommendation for revocation was consequently made"</i> (RWS-1 Mutiso, para 20). According to the State's witness Mr Njeru, this memorandum or "brief" concerned <i>"revocation of Cortec's prospecting licence"</i> (RWS-1 Njeru, para 14).</p>	<p>issue of whether there were "irregularities" in the process that preceded the grant of SML 351. These alleged irregularities are part of the State's "red flags" case on corruption.</p> <p>Further, this document is also relevant and material to the state of mind of Commissioner Masibo, who the State alleges inexplicably changed his position on whether SPL 256 should be revoked. This alleged <i>volte-face</i> is part of the State's "red flags" corruption case.</p> <p>Finally, the content of this document is relevant and material to the Claimants' case on estoppel, preclusion and acquiescence: if it is true that, in this memorandum, Commissioner Masibo</p>	<p>ground for the Claimants' document request is rejected.</p> <p>As to the Claimants' contention that the Document is relevant to the Claimants' case on estoppel, preclusion and acquiescence, the Claimants have not to date pleaded any such case. Until such time as the Claimants provide a full explanation and particulars of their case on estoppel, preclusion and acquiescence, and the legal basis for it, the State reserves its position on the extent to which the requested Document is relevant or material to the</p>		

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No.	Req. Party	Documents or Category of Documents Requested By Claimants	Relevance and Materiality According to Requesting Party		Responses/ Objections to Document Request	Reply to Objections to Document Requests	Tribunal's Decision
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				made a " <i>recommendation for revocation</i> [of SPL 256]" to the PMLC, then the fact no such revocation was ordered would go towards proving that the State is estopped or precluded by its own conduct from now alleging that SPL 256 is invalid. ⁴	outcome of those arguments. However, in relation to the State's Corruption Objection, the State agrees to undertake reasonable searches for the requested Document and will produce any such responsive Document that is in the State's custody, possession or control.		
9.	CI	The letter from Permanent Secretary Mr Ali Mohammed to the Head of Public Service and Secretary to the Cabinet	As part of the State's Illegality Objection, the State contends that, as one of the outcomes of the PMLC meeting on	The requested Documents are relevant and material to the State's Illegality Objection. In particular, these Documents will go	The State denies that the requested Document will prove or disprove the State's allegations	The Claimants disagree with the State's objections, but at this stage no order from the	At the request of the Claimant no order will be made at this time.

⁴ The Claimants have not yet pleaded their case on estoppel, preclusion and acquiescence as these principles relate more (but not exclusively) to the merits of their claim. Accordingly, these arguments will be detailed in the Claimants' Reply on Merits to be filed on 21 July 2017. In their Counter-Memorial on Preliminary Objections, the Claimants reserved their rights in this regard (see Claimants' Counter-Memorial on Preliminary Objections, para 82).

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		dated on or about 31 January 2013 concerning the PMLC's decision to revoke SPL 256, and any Documents recording or reflecting the response(s) of the Head of Public Service and Secretary to the Cabinet.	31 January 2013, Permanent Secretary Mr Ali Mohamed said he would write to the Head of Public Service and Secretary to the Cabinet concerning the PMLC's decision to revoke SPL 256 and seek his concurrence (State's Counter-Memorial, para 123; Exhibit R-014).	<p>towards proving or disproving the State's allegations regarding the invalidity of SPL 256 (which, in turn, will bear on the State's allegations regarding the invalidity and "irregularity" of SML 351).</p> <p>Further, these Documents are relevant (and potentially material) to the State's Corruption Objection, because they may support or undermine the State's contention that Commissioner Masibo was alone in his change of opinion on the validity of SPL 256 (i.e. if the Head of Public Service and Secretary to the Cabinet did not concur with the PMLC's supposed decision to revoke SPL 256, then that would tend to corroborate the lawfulness of Commissioner Masibo's</p>	<p>regarding the validity of SPL 256. That question is subject to an objective test, and the opinion of Permanent Secretary Ali Mohammed is not determinative of that issue.</p> <p>Accordingly, this ground for the Claimants' document request is rejected.</p> <p>However, in relation to the State's Corruption Objection, the State agrees to undertake reasonable searches for the requested Document and will produce any such Document that is in the State's custody, possession or control.</p>	Tribunal is required.	

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				actions in issuing SML 351).			
10.	CI	Documents recording or reflecting discussions between members of the PMLC and officials of the Relevant Government Agencies in relation to CMK and its activities at Mrima Hill during the period from 22 May 2007 to 7 March 2013.	<p>As part of the State's Illegality Objection, the State contends that SPL 256 was issued and renewed in circumstances in which certain mandatory legal requirements were not met (State's Counter-Memorial, paras 62-70).</p> <p>In this area, the State places great emphasis on the role and deliberations of the PMLC (see, for example, State's Counter-Memorial, paras 123-125, where the State describes the PMLC meeting of 31 January 2013 and the discussion that occurred between the members regarding SPL 256; see</p>	<p>The requested Documents are relevant and material to the State's Illegality Objection because they will show the extent to which members of the PMLC discussed the merits of CMK's applications for a prospecting and mining licence with the Relevant Government Agencies, and the extent (if any) to which the members identified any mandatory legal requirements that CMK was yet to meet.</p> <p>These Documents are also relevant and material to the Claimants' case on estoppel, preclusion and acquiescence, as they will show the extent (if any) to which members of the PMLC and other Relevant</p>	The State's awareness and discussion of any failure by CMK to comply with Kenyan law in relation to the validity of SPL 256 will not be determinative of the question of whether CMK did in fact fail to comply with Kenyan law. That question is subject to an objective test, and the State's subjective state of awareness or otherwise of the legality of CMK's prospecting licence is not relevant to the determination of that issue. Accordingly this ground for the Claimants' document	<p>The Claimants do not accept the position the State is taking on the relevance of its own officials' knowledge.</p> <p>The State has alleged that the Claimants knew, or ought to have known, that CMK did not hold Prospecting Right 8258, SPL 256 could not be validly issued and SML 351 did not comply with Kenyan law (State's Counter-Memorial, paras 217-218, 464, 473,</p>	<p>The Claimants are entitled to such documentation in the custody of the PMLC recording or reflecting discussions related to the grounds of illegality subsequently alleged against the licences granted to the Claimants in respect of Mrima Hill.</p> <p>The relevant period is 22 May 2007 to 7 March 2013.</p> <p>Irrelevant material may be redacted.</p> <p>DPR is GRANTED in part.</p>

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			<p>also RWS-1 Njeru, para 8, which notes "<i>the PMLC sat usually every quarter and was responsible for reviewing all applications for mining concessions. The PMLC comprised members from the Ministry as well as other government agencies responsible for sanctioning mining projects such as the Kenya Forest Service and National Environmental Management Authority. The purpose of the PMLC was to provide appropriate checks and balances to ensure that licences were issued properly</i>"; see also RWS-1 Mutiso, para 7, where the witness states that "<i>the PMLC had the</i></p>	<p>Government Agencies were aware of the legal impediments and non-conformities that the State now alleges.</p> <p>These Documents are relevant and material to the State's Corruption Objection because they will show which other government officials (besides Commissioner Masibo) were involved in the processing of CMK's application for a mining licence over Mrima Hill. This information will in turn go towards proving or disproving the State's allegation that Commissioner Masibo acted independently when he issued SML 351.</p>	<p>request is rejected.</p> <p>As to the Claimants' contention that the Documents are relevant to the Claimants' case on estoppel, preclusion and acquiescence, the Claimants have not to date pleaded any such case. Until such time as the Claimants provide a full explanation and particulars of their case on estoppel, preclusion and acquiescence, and the legal basis for it, the State reserves its position on the extent to which the requested Documents are relevant or material to the outcome of those</p>	<p>475).</p> <p>Plainly, the State cannot be heard to make allegations about what the Claimants <i>should have known</i> without the State having to produce documents that will show what its own officials <i>actually knew</i> of the same legal issues.</p> <p>Further, it is obviously unreasonable for the State to contend that it does not need to answer this DPR because the Claimants have not yet provided full particulars of their case on estoppel, preclusion and</p>	

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			<i>important function of ensuring that applications for mining licences were being considered properly and only granted where there was full compliance with the law").</i>		arguments. The State further objects to the production of the requested Documents on the basis that the scope of the Documents is unreasonably broad. The burden on the State to identify and produce all "documents recording or reflecting discussions between members of the PMLC and officials of the Relevant Government Agencies" in relation to CMK and its activities at Mrima Hill over a nearly six-year period is disproportionate	acquiescence. The Claimants have indicated that they will plead their case on estoppel, preclusion and acquiescence in the merits (see Claimants' Counter-Memorial on Preliminary Objections, para 82). It is open to the Claimants to plead these matters in the merits: these doctrines principally operate as rebuttals to the State's illegality allegations, which the State has argued may be characterised as matters of jurisdiction/admissi	

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					<p>The Claimants state that the Documents will show "<i>which other government officials (besides Commissioner Masibo) were involved in the processing of CMK's application for a mining licence over Mrima Hill</i>", thereby "<i>disproving the State's allegation that Commissioner Masibo acted independently when he issued SML 351.</i>" However, the State has never denied that other officials were involved in the processing of CMK's application. Accordingly, it is unclear why these Documents are relevant and material</p>	<p>bility or the merits (see for example, State's Counter-Memorial, paras 213, 369, 377).</p> <p>In accordance with the schedule fixed by the Tribunal, the Claimants' Reply on Merits is due to be filed on 21 July 2017. Having cast its illegality case so broadly, the State cannot rely on the fact the Claimants' Reply on the Merits has not yet been filed to resist producing the requested Documents. Such an approach would defeat the purpose of document production and the Tribunal's</p>	

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					<p>to the State's Corruption Objection.</p> <p>In respect of Claimants' DPR 7, the State has agreed to undertake searches for official minutes of the meetings of the PMLC produced during the Relevant Period and which address CMK's application for a prospecting licence over Mrima Hill/and any renewal thereof, and will produce all such Documents that are in the State's custody, possession or control.</p> <p>It would be unreasonably burdensome and disproportionate to</p>	<p>scheduling orders.</p> <p>In any event, the requested Documents are obviously relevant and material to estoppel, preclusion and acquiescence. This is clear from the comments that the Claimants made in respect of this DPR. The State's attempt to feign ignorance of these aspects of the Claimants' case is unhelpful.</p> <p>Finally, the Claimants also deny that this DPR is unreasonably broad or disproportionate. It is framed to</p>	

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					<p>require the State to search all of the Relevant Government Agencies and produce any other responsive Documents.</p>	<p>capture a limited time period during which the relevant licences and rights were granted and further limited to discussions between a specific body (the PMLC) and Relevant Government Agencies and then further limited to only matters in relation to CMK and its activities at Mrima Hill.</p> <p>The burden of producing these Documents is not disproportionate. The State has placed great emphasis on the deliberations of the PMLC in the context of the</p>	

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						<p>State's Illegality Objection and the State's Corruption Objection. The State must accept the document production consequences that flow from the way it has framed its case.</p> <p>Accordingly, the Claimants maintain this DPR in its full scope.</p>	
11.	Cl	Documents created by (or for) the DMG between 4 April 2008 to 16 April 2010 recording or reflecting the grant of prospecting or mining rights or licences in or over the area covered by SPL 256.	In opposing the Claimants' FET claim, the State alleges that Mrima Hill was not included in SPL 256 until 1 April 2010 (State's Counter-Memorial, paras 83 and 465).	These Documents are relevant and material to the Claimants' FET claim – specifically, they go towards substantiating the Claimants' contention that they had a legitimate expectation (from 2008) that they held exclusive prospecting rights over	The Claimants assert that these Documents will substantiate the Claimants' contention that they had legitimate expectations with respect to exclusive prospecting rights over Mrima Hill. However, to the	The Claimants do not accept the State's position that these documents are not relevant or material to the Claimants' case in relation to legitimate expectations.	Claimants are entitled to documents in the possession, custody or control of the Department of Mines and Geography recording or reflecting the grant of prospecting or mining rights or licences in or over

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				<p>Mrima Hill.</p> <p>These Documents are also relevant and material to the State's Illegality Objection, in particular the allegation that SPL 256 did not include Mrima Hill until 1 April 2010.</p>	<p>extent that the Claimants were not a party to or in receipt of the requested Documents at the relevant time(s), those Documents could not have generated legitimate expectations on the part of the Claimants. The requested Documents are not, therefore, relevant or material to the Claimants' case in relation to legitimate expectations and this ground for the Claimants' document request is rejected.</p> <p>However, in connection with the State's Illegality Objection, the State agrees to undertake</p>	<p>First, the Claimants do not accept that a document needs to be addressed to an investor to generate a legitimate expectation protected by the FET standard.</p> <p>Second, even where a document is not addressed to or received by an investor, it may still be highly relevant and material as it may corroborate the legitimacy of an expectation that was generated by a document addressed to the investor. This corroborative purpose is what the Claimants were</p>	<p>the area covered by SPL 256 between 4 April 2008 and 16 April 2010.</p> <p>DPR 11 is GRANTED.</p>

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					<p>reasonable searches for the requested Documents and will produce all responsive Documents that are in the State's custody, possession or control.</p>	<p>referring to when (in their comments on this DPR) the Claimants said these documents "<i>go towards substantiating the Claimants' contention that they had a legitimate expectation</i>".</p> <p>The corroborative relevance and materiality of these documents is heightened by the fact that the State alleges that many of the documents that were addressed to the Claimants were "<i>irregular</i>".</p> <p>Accordingly, the Claimants maintain this DPR in its full scope (i.e. the</p>	

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						Claimants do not accept that the State may produce on a narrower basis corresponding to the State's Illegality Objection).	
12.	CI	Copies of all maps in the custody, possession or control of the Relevant Government Agencies created by or for the State between 4 April 2008 and 5 August 2013 displaying the area covered by SPL 256, including (but not limited to) any maps stored in the Mining Cadastre System referred to at Exhibit R-155.	The Claimants contend that they lawfully prospected and explored Mrima Hill under the terms of an exclusive prospecting licence (Claimants' Memorial of Claim, para 2). The Claimants contend that the grant and terms of this exclusive prospecting licence generated legitimate expectations (protected by the FET standard) vis-a-vis their existing rights over Mrima Hill and their entitlement to a future mining licence (Claimants' Memorial of	The requested maps are relevant and material to the Claimants' FET claim: they go towards substantiating the Claimants' contention that they had a legitimate expectation (from 2008) that they held exclusive prospecting rights over Mrima Hill and that they would be entitled to a mining licence. These maps are also relevant and material to the State's Illegality Objection, in particular the allegation that SPL 256 did not include Mrima Hill until 1	The Claimants assert that these Documents will substantiate the Claimants' contention that they had legitimate expectations with respect to exclusive prospecting rights over Mrima Hill. However, to the extent that the Claimants were not a party to or in receipt of the requested Documents at the relevant time(s), those Documents could not have generated legitimate	As to the State's response regarding legitimate expectations, see the Claimants' reply under DPR 11 above. The Claimants maintain this DPR in its full scope (i.e. the Claimants do not accept that the State may produce on a narrower basis corresponding to the State's Illegality Objection).	To the extent maps displaying the area covered by SPL 256 are included in the records of the DMG created by or for the Respondent between 4 April 2008 and 1 April 2010, they are to be produced. DPR is GRANTED in part.

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			Claim, paras 181-192). The State alleges that Mrima Hill was not included in SPL 256 until 1 April 2010 (State's Counter-Memorial, paras 83, 465).	April 2010.	<p>expectations on the part of the Claimants. The requested Documents are not, therefore, relevant or material to the Claimants' case in relation to legitimate expectations and this ground for the Claimants' document request is rejected.</p> <p>However, in connection with the State's Illegality Objection, the State agrees to undertake reasonable searches for the requested Documents and will produce all responsive Documents that are in the State's custody, possession</p>		

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					or control.		
b. Special Mining Licence No. 351							
13.	CI	Documents created by or for the DMG between 11 January 2012 and 7 March 2013 recording or reflecting the extent to which CMK's application for a mining licence over Mrima Hill was missing any information or documents required by the Mining Act, or other applicable laws or regulations.	The Claimants contend as part of their expropriation claim (and their FET claim) that SML 351 conferred upon CMK the right to explore and exploit the mineral resources at Mrima Hill, and that they were unlawfully deprived of these rights in breach of the BIT and international law (Claimants' Memorial paras 156-208). As part of the State's Illegality Objection and its defence on the merits, the State alleges that CMK's application for a mining licence was incomplete (State's Counter-Memorial, para	The requested Documents are relevant and material to the Claimants' expropriation and FET claims. These documents are also relevant and material to the State's Illegality Objection and the Claimants' case on estoppel, preclusion and acquiescence. These documents will go towards proving or disproving the State's argument that CMK's application for a mining licence was incomplete and, if it was, the extent of the action (if any) that officials at the DMG took in response. If the DMG identified areas in which CMK's application	The State objects to this request on the basis that the Documents requested are not sufficiently relevant or material to the outcome of the case. The Claimants assert that the requested Documents are relevant or material to the Claimants' expropriation or FET claims, but have failed to explain the basis for their assertion. Further, the State's awareness of any failure by CMK to comply with Kenyan	The Claimants are troubled by the State's response that these documents do not need to be produced because they " <i>are not sufficiently relevant or material to the outcome of the case</i> ". The State appears to be trying to rely on the circumstantial nature of its illegality case as a way of evading document production. One of the many	Both DPR 13 and DPR 11 relate to documents in the possession, custody or control of DMG. DPR 13 covers a later time period and a narrower subject matter. To the extent there exists documentation noting deficiencies in the possession, custody or control of the DMG in the CMK application for a mining licence over Mrima Hill, between 11 January 2012 and 7 March 2013, such documents are to be produced. DPR 13 is

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			102 <i>et seq.</i>	was incomplete but took no action, then that will be relevant to the Claimants' case on estoppel, preclusion and acquiescence.	law in relation to its application for a mining licence will not be determinative of the question of whether CMK did in fact fail to comply with Kenyan law. That question is subject to an objective test, and the State's subjective state of awareness or otherwise of the legality of CMK's application is not relevant to the determination of that issue. Accordingly this ground for the Claimants' document request is also rejected. As to the Claimants' contention that the Documents are relevant to the	allegations that the State makes is that CMK's application for a mining licence was incomplete (State's Counter-Memorial, para 102 <i>et seq.</i> If the State intends to maintain its circumstantial case on illegality, then every circumstance upon is relevant and material to the outcome the State seeks (i.e. dismissal of the Claimants' claims). If the State wishes to maintain its position that whether or not CMK's application for a mining	GRANTED.

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No.	Req. Party	Documents or Category of Documents Requested By Claimants	Relevance and Materiality According to Requesting Party		Responses/ Objections to Document Request	Reply to Objections to Document Requests	Tribunal's Decision
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					<p>Claimants' case on estoppel, preclusion and acquiescence, the Claimants have not to date pleaded any such case. Until such time as the Claimants provide a full explanation and particulars of their case on estoppel, preclusion and acquiescence, and the legal basis for it, the State reserves its position on the extent to which the requested Documents are relevant or material to the outcome of those arguments.</p>	<p>licence was incomplete is not relevant and material, it should withdraw its allegation that the Claimants did not comply with the requirements for a mining licence (State's Counter-Memorial, para 137 <i>et seq</i>).</p> <p>Otherwise, the State should have to produce the requested documents.</p> <p>Further, this DPR does not relate to the State's subjective awareness of non-compliance but to facts evidencing the alleged non-</p>	

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						<p>compliance by CMK in its application for a mining licence.</p> <p>As to the State's response concerning estoppel, preclusion and acquiescence, see the Claimants' reply under DPR 10 above.</p> <p>Accordingly, the Claimants maintain this request.</p>	
14.	CI	Documents exchanged between officials of the DMG and the other Relevant Government Agencies between 11 January 2012 and 7 March 2013 recording or reflecting issues, concerns or support for CMK's	The Claimants' FET claim is, in part, based upon legitimate expectations generated by the conduct of the DMG and other Relevant Government Agencies towards the Claimants. These	The requested Documents are relevant to the Claimants' claim that the State breached its FET obligations: if the DMG or other Relevant Government Agencies did not find issues that created a legal impediment to SML 351, or	The State objects to this request on the basis that the Documents requested are not sufficiently relevant or material to the outcome of the case.	The Claimants repeat their comments under DPR 13 above regarding the State's apparent attempt to rely on the circumstantial nature of its case to	The Claimants are entitled to documents in the possession, custody or control of the DMG only (i.e. not extending to other government departments or agencies) recording

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		application for a mining licence.	<p>legitimate expectations included the expectation that, as stated in clause 1 of SML 351, the Commissioner of Mines and Geology had authority to grant SML 351 pursuant to the applicable legislation (Claimants' Memorial of Claim, para 186).</p> <p>As part of the State's Illegality Objection, the State asserts that "<i>the Claimants knew or ought to have known that the licence had not been issued in accordance with Kenyan law</i>" (State's Counter-Memorial, para 137). This element of the State's Illegality Objection is also reworked in the State's defence on the merits where the State alleges</p>	<p>indeed supported CMK's application, that would support the Claimants' case that they had legitimate expectations with respect to the grant and maintenance of SML 351.</p> <p>These documents are relevant and material to the State's Illegality Objection because the documents exchanged between the DMG and the other Relevant Government Agencies regarding CMK's application for a mining licence will show the State's awareness or otherwise of any failure by CMK to comply with Kenyan law. Further, if these documents show that the DMG or other Relevant Government Agencies identified areas in which CMK did <i>not</i> comply with Kenyan law but took no action, then that will be</p>	The Claimants assert that these Documents will substantiate the Claimants' contention that they had legitimate expectations with respect to the grant and maintenance of SML 351. However, to the extent that the Claimants were not a party to or in receipt of the requested Documents at the relevant time(s) and accordingly those Documents could not have generated legitimate expectations on the part of the Claimants. The requested Documents are not, therefore, relevant or material to the Claimants' case in relation to	<p>avoid producing documents. If the State maintains its position that these documents are "<i>not sufficiently relevant or material to the outcome of the case</i>", the State should withdraw the allegations that the Claimants did not comply with the requirements for a mining licence (State's Counter-Memorial, para 137 <i>et seq</i>).</p> <p>Otherwise, the State must produce these requested documents.</p> <p>As to the State's contention that its illegality case is subject to an</p>	<p>issues, concerns or support by other departments or agencies for CMK's application for a mining licence. The relevant time period is 11 January 2012 and 7 March 2013.</p> <p>DPR is GRANTED in part.</p>

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			that " <i>even if corruption is not established, it is clear that SML 351 was not granted in accordance with Kenyan law</i> " (State's Counter-Memorial, para 379). The State asserts that this alleged failure to comply with Kenyan law means that SML 351 " <i>is not capable of being expropriated</i> " (State's Counter-Memorial para, 377).	relevant to the Claimants' case on estoppel, preclusion and acquiescence. The requested Documents are also relevant and material to the State's defence on the merits because an element of the State's defence depends upon the State establishing its Illegality Objection.	legitimate expectations and this ground for the Claimants' document request is rejected. Further, the State's awareness of any failure by CMK to comply with Kenyan law in relation to its application for a mining licence will not be determinative of the question of whether CMK did in fact fail to comply with Kenyan law. That question is subject to an objective test, and the State's subjective state of awareness or otherwise of the legality of CMK's application is not relevant to the determination of that	objective test alone, that is not credible (see the Claimants' reply under DPR 3 above). In any event, the State's response is wrong in substance: this DPR does not relate to the State's subjective awareness of non-compliance but to facts evidencing the alleged non-compliance by CMK in its application for a mining licence. As to the State's response concerning estoppel, preclusion and	

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					<p>issue. Accordingly this ground for the Claimants' document request is also rejected.</p> <p>As to the Claimants' contention that the Documents are relevant to the Claimants' case on estoppel, preclusion and acquiescence, the Claimants have not to date pleaded any such case. Until such time as the Claimants provide a full explanation and particulars of their case on estoppel, preclusion and acquiescence, and the legal basis for it, the State reserves its position on the extent to which the requested Documents</p>	<p>acquiescence, see the Claimants' reply under DPR10 above.</p> <p>As to the State's response concerning legitimate expectations, see the Claimants' reply under DPR 11 above.</p> <p>The Claimants maintain this request.</p>	

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No.	Req. Party	Documents or Category of Documents Requested By Claimants	Relevance and Materiality According to Requesting Party		Responses/ Objections to Document Request	Reply to Objections to Document Requests	Tribunal's Decision
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					are relevant or material to the outcome of those arguments.		
15.	CI	Documents recording or reflecting discussions between members of the PMLC in relation to CMK's application for a mining licence over Mrima Hill.	The Claimants' FET claim is, in part, based upon legitimate expectations generated by the conduct of the Relevant Government Agencies, officials from which were members of the PMLC. These legitimate expectations included the expectation that, as stated in clause 1 of SML 351, the Commissioner of Mines and Geology had authority to grant SML 351 pursuant to the applicable legislation (Claimants' Memorial of Claim, para 186). As part of the State's Illegality Objection, the	The requested Documents are relevant to the Claimants' claim that the State breached its FET obligations: if the PMLC did not find issues that created a legal impediment to SML 351, or indeed supported CMK's application, that would support the Claimants' case that the conduct of Relevant Government Agencies generated a legitimate expectation on the part of the Claimants with respect to the grant and maintenance of SML 351. These Documents are also relevant and material to the State's Illegality Objection because the documents	The State objects to this request on the basis that the Documents requested are not sufficiently relevant or material to the outcome of the case. The Claimants assert that these Documents will substantiate the Claimants' contention that they had legitimate expectations with respect to the grant and maintenance of SML 351. However, to the extent that the Claimants were not a party to or in receipt of the requested	The Claimants repeat their comments under DPR 13 above regarding the State's apparent attempt to rely on the circumstantial nature of its case to avoid producing documents. If the State maintains its position that these documents are " <i>not sufficiently relevant or material to the outcome of the case</i> ", the State should withdraw the allegations that the Claimants did not comply with the requirements	The DPR 15 is the equivalent of DPR 7 but in relation to the <i>mining</i> licence issued to CMK. The Claimants are entitled to an order for such documents in the custody, possession or control of the PMLC in the same terms as DPR 7 <i>mutatis mutandis</i> . DPR 15 is GRANTED.

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			<p>State asserts that "<i>the Claimants knew or ought to have known that the licence had not been issued in accordance with Kenyan law</i>" (State's Counter-Memorial, para 137). This element of the State's Illegality Objection is also reworked in the State's defence on the merits where the State alleges that "<i>even if corruption is not established, it is clear that SML 351 was not granted in accordance with Kenyan law</i>" (State's Counter-Memorial, para 379). The State asserts that this alleged failure to comply with Kenyan law means that SML 351 "<i>is not capable of being expropriated</i>" (State's Counter-</p>	<p>exchanged between the PMLC regarding CMK's application for a mining licence will show the State's awareness or otherwise of any failure by CMK to comply with Kenyan law. Further, if the PMLC identified areas in which CMK did not comply with Kenyan law but took no action, or if they reflect State support for CMK, then that will be relevant and material to the Claimants' case on estoppel, preclusion and acquiescence.</p> <p>The requested Documents are also relevant and material to the State's defence on the merits because an element of the State's defence depends upon the State establishing its Illegality Objection.</p>	<p>Documents at the relevant time(s), those Documents could not have generated legitimate expectations on the part of the Claimants. The requested Documents are not, therefore, relevant or material to the Claimants' case in relation to legitimate expectations and this ground for the Claimants' document request is rejected.</p> <p>Further, the State's awareness of any failure by CMK to comply with Kenyan law in relation to its application for a mining licence will not be determinative of the question of</p>	<p>for a mining licence (State's Counter-Memorial, para 137 <i>et seq</i>). Otherwise, the State must produce these requested documents.</p> <p>As to the State's response concerning legitimate expectations, see the Claimants' reply under DPR 11 above.</p> <p>As to the State's contention that its illegality case is subject to an objective test alone, that is not credible (see the Claimants' reply under DPR 3 above). In any</p>	

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No.	Req. Party	Documents or Category of Documents Requested By Claimants	Relevance and Materiality According to Requesting Party		Responses/ Objections to Document Request	Reply to Objections to Document Requests	Tribunal's Decision
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			Memorial, para 377). As regards the importance of the PMLC in determining the legality of CMK's application, see DPRs 7 to 10 above.	.	whether CMK did in fact fail to comply with Kenyan law. That question is subject to an objective test, and the State's subjective state of awareness or otherwise of the legality of CMK's application is not relevant to the determination of that issue. Accordingly this ground for the Claimants' document request is also rejected. As to the Claimants' contention that the Documents are relevant to the Claimants' case on estoppel, preclusion and acquiescence, the Claimants have not to date pleaded	event, the State's response is wrong in substance: this DPR does not relate to the State's subjective awareness of non-compliance but to facts evidencing the alleged non-compliance by CMK in its application for a mining licence. As to the State's response concerning estoppel, preclusion and acquiescence, see the Claimants' reply under DPR 10 above. The official minutes of the PMLC are not	

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					<p>any such case. Until such time as the Claimants provide a full explanation and particulars of their case on estoppel, preclusion and acquiescence, and the legal basis for it, the State reserves its position on the extent to which the requested Documents are relevant or material to the outcome of those arguments.</p> <p>Notwithstanding the above, the State has agreed to produce any official minutes of the PMLC produced between 11 January 2012 and 5 August 2013 and which address CMK's application</p>	<p>sufficient to meet this DPR. If (as the State contends) the PMLC is <i>ad hoc</i>, there may well be documents other than official minutes that record or reflect discussions between members of the PMLC in relation to CMK's application for a mining licence over Mrima Hill. These documents should be produced.</p> <p>Accordingly, the Claimants maintain this request in its full scope.</p>	

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					for a mining licence over Mrima Hill and will produce such Documents that are in the State's custody, possession or control.		
16.	CI	Documents recording or reflecting discussions between members of the PMLC and officials of other Relevant Government Agencies in relation to CMK's application for a mining licence created or exchanged between 11 January 2012 and 5 August 2013.	As part of the State's Illegality Objection, the State asserts that " <i>the Claimants knew or ought to have known that the licence had not been issued in accordance with Kenyan law</i> " (State's Counter-Memorial, para 137). This element of the State's Illegality Objection is also reworked in the State's defence on the merits where the State alleges that " <i>even if corruption is not established, it is clear that SML 351 was not granted in</i>	The requested Documents are relevant to the Claimants' claim that the State breached its FET obligations: if the PMLC did not find issues that created a legal impediment to SML 351, or indeed supported CMK's application, that would support the Claimants' case that the conduct of Relevant Government Agencies generated a legitimate expectation on the part of the Claimants with respect to the grant and maintenance of SML 351. These Documents are also	The State objects to this request on the basis that the Documents requested are not sufficiently relevant or material to the outcome of the case. The Claimants assert that these Documents will substantiate the Claimants' contention that they had legitimate expectations with respect to the grant and maintenance of SML 351. However, to the extent that the	The Claimants repeat their comments under DPR 13 above regarding the State's apparent attempt to rely on the circumstantial nature of its case to avoid producing documents. If the State maintains its position that these documents are " <i>not sufficiently relevant or material to the outcome of the case</i> ", the State should withdraw the allegations that	Documents produced in response to DPR 14 will suffice for DPR 16 as well. No production order is made in respect of DPR 16. DPR 16 is REJECTED.

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			<p><i>accordance with Kenyan law</i>" (State's Counter-Memorial, para 379). The State asserts that this alleged failure to comply with Kenyan law means that SML 351 "is not capable of being expropriated" (State's Counter-Memorial, para 377).</p> <p>The Claimants' FET claim is, in part, based upon legitimate expectations generated by the conduct of the PMLC and other Relevant Government Agencies towards the Claimants. These legitimate expectations included the expectation that, as stated in clause 1 of SML 351, the Commissioner of Mines and Geology had authority to grant SML</p>	<p>relevant and material to the State's Illegality Objection because the documents exchanged between the PMLC and other Relevant Government Agencies regarding CMK's application for a mining licence will show the State's awareness or otherwise of any failure by CMK to comply with Kenyan law. Further, if the PMLC or other Relevant Government Agencies identified areas in which CMK did not comply with Kenyan law but took no action, or made statements recording the State's support for CMK, then that will be relevant and material to the Claimants' case on estoppel, preclusion and acquiescence.</p> <p>The requested Documents are also relevant and</p>	<p>Claimants were not a party to or in receipt of the requested Documents at the relevant time(s), those Documents could not have generated legitimate expectations on the part of the Claimants. The requested Documents are not, therefore, relevant or material to the Claimants' case in relation to legitimate expectations and this ground for the Claimants' document request is rejected.</p> <p>Further, the State's awareness of any failure by CMK to comply with Kenyan law in relation to its application for a</p>	<p>the Claimants did not comply with the requirements for a mining licence (State's Counter-Memorial, para 137 <i>et seq</i>). Otherwise, the State must produce these requested documents.</p> <p>As to the State's response concerning legitimate expectations, see the Claimants' reply under DPR 11 above.</p> <p>As to the State's contention that its illegality case is subject to an objective test alone, that is not credible (see the</p>	

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			<p>351 pursuant to the applicable legislation (Claimants' Memorial of Claim, para 186).</p> <p>As regards the importance of the PMLC in determining the legality of CMK's application, see DPRs 7 to 10 above.</p>	<p>material to the State's defence on the merits because an element of the State's defence depends upon the State establishing its Illegality Objection.</p> <p>These documents are relevant and material to the State's Corruption Objection because they will show which other government officials (besides Commissioner Masibo) were involved in the processing of CMK's application for a mining licence over Mrima Hill. In other words, these documents will go towards proving or disproving the State's allegation that Commissioner Masibo acted independently when he issued SML 351.</p>	<p>mining licence will not be determinative of the question of whether CMK did in fact fail to comply with Kenyan law. That question is subject to an objective test, and the State's subjective state of awareness or otherwise of the legality of CMK's application is not relevant to the determination of that issue. Accordingly this ground for the Claimants' document request is also rejected.</p> <p>As to the Claimants' contention that the Documents are relevant to the Claimants' case on estoppel, preclusion</p>	<p>Claimants' reply under DPR 3 above).</p> <p>As to the State's response concerning estoppel, preclusion and acquiescence, see the Claimants' reply under DPR10 above.</p> <p>For the reasons set out at DPR 15, the official minutes of PMLC meetings are not sufficient.</p>	

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					<p>and acquiescence, the Claimants have not to date pleaded any such case. Until such time as the Claimants provide a full explanation and particulars of their case on estoppel, preclusion and acquiescence, and the legal basis for it, the State reserves its position on the extent to which the requested Documents are relevant or material to the outcome of those arguments.</p> <p>The Claimants state that the Documents will show "<i>which other government officials (besides Commissioner Masibo) were</i></p>		

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No.	Req. Party	Documents or Category of Documents Requested By Claimants	Relevance and Materiality According to Requesting Party		Responses/ Objections to Document Request	Reply to Objections to Document Requests	Tribunal's Decision
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					<p><i>involved in the processing of CMK's application for a mining licence over Mrima Hill", thereby "disproving the State's allegation that Commissioner Masibo acted independently when he issued SML 351."</i></p> <p>The State has never denied that other officials were involved in the processing of CMK's application. Accordingly, it is unclear why these Documents are relevant and material to the State's Corruption Objection</p> <p>Notwithstanding the above, the State has agreed to produce any official minutes</p>		

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					of the PMLC produced between 11 January 2012 (the date on which CMK's application was lodged (CWS-1 Anderson, para. 91)) and 5 August 2013 and which address CMK's application for a mining licence over Mrima Hill and will produce such Documents that are in the State's custody, possession or control.		
17.	CI	The "template" Special Mining Lease used by the DMG during the Relevant Period.	As part of its Illegality Objection, the State alleges that SML 351 was incapable of being lawfully issued. As part of its Corruption Objection, the State contends that the circumstances in which Commissioner Masibo	This document is relevant and material to the State's Illegality Objection and the State's Corruption Objection. Essentially, under both objections, the State points to supposed errors in the form and content of SML	The State has undertaken searches for this Document and this Document does not exist. There was no template of a Special Mining Lease used by the DMG as a	The Claimants are concerned by the State's response to this DPR, which is not consistent with the evidence given by its witness, Mr Mutiso. In paragraph 22 of	In light of the Respondent's assurance that no "template" exists, there will be no order for the production of a non-existent document. Whether or not this reflects adversely on the

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			<p>issued SML 351 were "extraordinary" (State's Counter-Memorial, para 270) and that <i>"the drafting of SML 351 was riddled with errors"</i> (State's Counter-Memorial, para 135). The State relies on the witness Mutiso, whose evidence is that Commissioner Masibo indicated that he would issue the licence "by himself" (RWS-1 Mutiso, para 22) and that Commissioner Masibo asked for "a copy of the template of the Special Mining Lease that had been issued to a company known as Kilimapesa Gold Pty Ltd" (RWS-1 Mutiso, para 22). Mr Mutiso describes how SML 351 contains "various errors" that</p>	<p>351 as evidence of its irregularity.</p> <p>In order to test the State's allegation that the form and content of SML 351 corroborate its irregularity, this "template" is required as a comparator.</p>	<p>Special Mining Lease is a negotiated document with no standard form.</p> <p>Further, the Claimants are in possession of a special mining lease granted to Kilimapesa Gold Pty Ltd at Exhibit R-015, which Commissioner Masibo asked for prior to the creation of SML 351.</p>	<p>his witness statement, Mr Mutiso describes how he was asked for "a copy of the template of the Special Mining Lease that had been issued to a company known as Kilimapesa Gold Pty Ltd". Mr Mutiso is clearly referring to two separate documents: a "template of" the special mining lease granted to Kilimapesa Gold Pty Ltd (Exhibit R-015) and the special mining lease that was actually "issued" to Kilimapesa Gold Pty Ltd (Exhibit</p>	<p>credibility of Mr. Mutiso is not an issue for consideration at this time.</p> <p>DPR 17 is REJECTED.</p>

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			suggest it was " <i>issued in a hurry</i> " (RWS-1 Mutiso, para 27).			R-015). The Claimants request the Tribunal to order the State to produce the " <i>template</i> ", and that if no such Document exists, the weight given to Mr Mutiso's evidence ought to be diminished.	
18.	CI	All special mining licences and special mining leases issued during the Relevant Period, other than those signed by Commissioner Masibo.	As part of the State's Illegality Objection and the State's Corruption Objection, the State alleges that Commissioner Masibo acted independently (" <i>by himself</i> " - RWS-1 Mutiso, para 22) and unlawfully when he issued SML 351 (State's Counter-Memorial, para 136). To corroborate its	The requested documents are relevant and material to the State's Illegality Objection and the State's Corruption Objection. These documents are needed as comparators to test the State's allegations regarding the supposed "errors" in SML 351 and the argument that these "errors" support an (corroborative) inference that SML 351 was	The State objects to this request on the basis that: i. the Documents sought are not sufficiently relevant or material to the outcome of the case; ii. the request is	Given that the State has said (in response to DPR 17) that " <i>a Special Mining Lease is a negotiated document with no standard form</i> ", the only way to test the State's contention that SML 351 contained " <i>errors</i> " and was	The request for the production of all special mining licences and special mining licences issued in Kenya during the relevant period is unduly burdensome and not justified by materiality or any potential probative

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			<p>allegations against Commissioner Masibo, the State alleges that <i>"the drafting of SML 351 was riddled with errors"</i> (State's Counter-Memorial, para 135). The State relies on the witness Mutiso, who points to certain alleged "errors" that include references to gold, the inconsistent use of the terms "lease" and "licence" and the fact that the plot number is missing from both the front page and Schedule A of SML 351 (RWS-1 Mutiso, para 27).</p>	<p>the product of corruption or misconduct on the part of Commissioner Masibo. If other mining licences contain similar (or other) errors, then that would suggest that no such inference can be drawn.</p> <p>Clearly, a full set of comparator licences is required for this purpose, as the State has put the wider licensing practice of the DMG in issue by alleging that SML 351 contains features not seen in other mining licences or leases.</p>	<p>unreasonably broad and unspecific;</p> <p>iii. the burden on the State to identify and produce such Documents is disproportionate and if Documents were to be produced, if any, such Documents would not be material to the outcome of this case; and</p> <p>iv. the request is a fishing expedition.</p> <p>In particular, the requested Documents are not sufficiently</p>	<p><i>"irregular"</i> in form is by looking at every special mining licence and special mining lease that was issued during the Relevant Period.</p> <p>Further, it is impossible to reconcile the State's contention that <i>"a Special Mining Lease is a negotiated document with no standard form"</i> with its suggestion (in response to this DPR) that a single licence – the special mining lease granted to Kilimapesa Gold Pty Ltd (Exhibit R-015) can be used as a <i>"comparator"</i>.</p>	<p>value.</p> <p>DPR 18 is REFUSED</p>

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					<p>relevant or material because, inter alia, on the face of SML 351 at Exhibit C-9, it is clear that there are fundamental errors in the drafting of the document, as pleaded by the State. The production of any other licences will not materially assist the analysis of whether SML 351 was issued irregularly, as a product of corruption or misconduct on the part of Commissioner Masibo.</p> <p>Further, the State considers that this is an extremely broad request and it would be disproportionate for the State to be</p>	<p>If there is no standard form, no single licence will ever be of probative value as a comparator. The State seems to be trying to construct the sample itself. That cannot be permitted by the Tribunal.</p> <p>Clearly, considering what the State has said in response to DPR 17, no credit should be given to the State's suggestion that this DPR is "<i>inappropriate</i>" and a "<i>fishing expedition</i>".</p> <p>As to the State's response that "<i>the Documents sought</i></p>	

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					<p>required to search for the requested Documents due to the volume of Documents that would need to be searched.</p> <p>Further, the State has already produced a comparator special mining lease, granted to Kilimapesa Gold Pty Ltd, for the Claimants to review at Exhibit R-015. However, the Claimants have chosen not to acknowledge that this document has already been produced. This request appears to be an inappropriate fishing expedition for Documents which are not</p>	<p><i>are not sufficiently relevant or material to the outcome of the case",</i> the Claimants repeat their comments under DPR 13 above regarding the State's apparent attempt to rely on the circumstantial nature of its case to avoid producing documents. If the State maintains its position that the "errors" in SML 351 are not relevant and material, the State should withdraw all allegations it makes concerning the alleged errors in SML 351 and the inferences that can be drawn from</p>	

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					<p>relevant or material to the outcome of the case.</p>	<p>them (including the very serious inference that SML 351 was the product of corruption). Otherwise, the State should produce all of the documents sought in this DPR.</p> <p>Finally, this DPR is not unreasonably broad, unspecific or disproportionate. As far as the Claimants are aware, very few special mining licences and special mining leases were issued during the Relevant Period other than by Commissioner Masibo. In any event, the request</p>	

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						relates to a specific and narrow category of Documents which the State should have readily on hand. After all, the request is for the copies of actual licences, which the State must have in reasonably good order (as part of the regulation of mining in its territory). The Claimants maintain this DPR.	
19.	CI	All mining licences and mining leases (special or otherwise) signed by Commissioner Masibo during his tenure as Commissioner of Mines and Geology.	As part of the State's Illegality Objection and the State's Corruption Objection, the State alleges that " <i>the drafting of SML 351 was riddled with errors</i> " that suggest it was " <i>issued in a</i>	These documents are relevant and material to the State's Illegality Objection and the State's Corruption Objection. These documents are needed as comparators to test the State's allegations regarding	The State objects to this request on the same grounds as set out in response to the Claimants' DPR 18 above.	The Claimants repeat their reply to DPR 18. These documents must be produced. The State alleges	For jurisdictional purposes the production of all mining licences and mining leases signed by Commissioner Masibo during his tenure as

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			<p><i>hurry</i>" (State's Counter-Memorial, para 135). The errors Mr Mutiso points to include references to gold, the inconsistent use of the terms "lease" and "licence" and the fact that the plot number is missing from both the front page and Schedule A of SML 351 (Mutiso RWS-1, para 27). The State argues, in effect, that these "errors" corroborate its wider case that SML 351 was irregular and invalid.</p>	<p>the supposed errors in SML 351 and the argument that they support an (corroborative) inference of irregularity.</p> <p>If other licences issued by Commissioner Masibo contain similar (or other) errors, then that would suggest that no inference of misconduct on his part can be drawn from the "errors" in SML 351.</p> <p>To conduct this analysis, the Claimants need a complete set of comparator licences so they have a complete picture of licensing practice under Commissioner Masibo.</p>		<p>that the "<i>errors</i>" and "<i>irregularities</i>" in SML 351 are indicative of the corrupt circumstances in which Commissioner Masibo issued the licence.</p> <p>However, it is only possible to determine what weight should be given to such irregularities (if they exist), and whether any inference of misconduct or corruption can be drawn from them, if SML 351 can be assessed alongside similar licences granted by Commissioner</p>	<p>Commissioner of Mines is burdensome and disproportionate to their probative value.</p> <p>DPR 19 is REFUSED.</p>

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						<p>Masibo.</p> <p>Accordingly, the requested Documents are relevant and material to the serious allegations the State has made.</p> <p>If the State maintains its position that the "errors" in SML 351 are <i>not</i> relevant and material, the State should withdraw all allegations it makes concerning the alleged errors in SML 351 and the inferences that can be drawn from them (including corruption).</p>	

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20.	CI	Documents created or received by the Relevant Government Agencies and the Kenyan Chamber of Mines recording or reflecting the purpose, legal status or use of the "Mining Investment Roadmap".	<p>A significant element of the State's Illegality Objection is based on the allegation that the Claimants did not comply with the allegedly "<i>compulsory conditions</i>" of the Mining Investment Road Map (see State's Counter-Memorial, paras 40, 103 and 137).</p> <p>The Claimants also refer to the Mining Investment Road Map in the context of it being provided by the State as a practical guide setting out the steps for obtaining a mining licence (see Claimants' Memorial, para 63). A State official (Commissioner Masibo) represented to the Claimants that if they completed the steps in</p>	<p>The requested Documents are relevant and material to the Claimants' claims and the State's Illegality Objection. These documents will reveal the extent to which Relevant Government Agencies have acted in a manner that is consistent with the position the Claimants take (which is that the Mining Investment Road Map State was represented to them as a guide) or the position the State takes in this arbitration, which is that the Mining Investment Road Map expresses a set of "<i>compulsory conditions</i>".</p> <p>These Documents are also relevant and potentially material to the Claimants' case on estoppel, preclusion and acquiescence: the Mining Investment Road Map was given to the</p>	<p>The State objects to this request on the following basis:</p> <ul style="list-style-type: none"> i. the scope of the request is unreasonably broad; and ii. that the requested Documents are not sufficiently relevant or material to the outcome of the case. <p>The scope of the request is unreasonably broad and unspecific as it would require extensive searches, which are not limited by time, and would potentially capture a</p>	<p>This DPR is not too broad. However, the Claimants are happy to narrow this DPR to the Relevant Period.</p> <p>As to the State's contention that the requested Documents "<i>are not sufficiently relevant or material to the outcome of the case</i>", the Claimants repeat their comments under DPR 13 above regarding the State's apparent attempt to rely on the circumstantial nature of its case to avoid producing documents. The State's contention that the Mining</p>	<p>Although the "Mining Investment Roadmap" is relevant, a copy is in the possession of the Claimants. The request for documents created or received by "the relevant government agencies and the Kenya Chamber of Mines" in respect of this document is far too broad and unfocused.</p> <p>DPR 20 is REFUSED.</p>

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			Reference to Submissions	Comments			
			<p>the Mining Investment Road Map they would be issued a mining licence (CWS-1 Anderson, para 84). However, the Claimants deny that the Mining Investment Road Map is itself an instrument of Kenyan law or that it could impose "mandatory legal requirements" (see Claimants' Counter-Memorial on Preliminary Objections, para 37). Further the Claimants' independent expert on Kenyan law finds that "The Mining Investment Road Map is not the Mining Law of Kenya. It is also not a statutory instrument nor a schedule made pursuant to the Mining Act and it has no formal relationship with the</p>	<p>Claimants by the State and the Claimants relied upon it in preparing their application for a mining licence. If these documents show that the Relevant Government Agencies understood that completion of the steps in the Mining Investment Road Map would mean the applicant was entitled to a mining licence, that subjective belief would support the Claimants' case on estoppel, preclusion and acquiescence.</p>	<p>significant number of Documents.</p> <p>On the Claimants' own case, the Claimants understood that the Mining Investment Road Map "set out the steps for obtaining a mining licence" (Claimants' Memorial, para. 63) and Mr Anderson "resolved to follow it strictly and [...]" told his "staff repeatedly that we needed [to follow] this" (CWS-1 Anderson, para. 85).</p> <p>The Claimants have now sought to resile from that position by reference to expert evidence. With this</p>	<p>Investment Road Map imposed "compulsory conditions" is one of the key planks of the State's Illegality Objection (this contention is also part of the State's circumstantial case on corruption). If these documents are not produced, there will be no way for the Claimants (or the Tribunal) to test whether the Mining Investment Road Map has the legal status and effect that the State alleges in this arbitration.</p> <p>While the Claimants will have some remedy</p>	

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			<i>Mining Act or a defined legal status.</i> " (CER1-Torgbor, para (a) in answer to Question 4).		request, the Claimants are merely fishing for evidence to support their change in position. It is clear from the Claimants' own case, that at the material time the Claimants understood the meaning and effect of the "Mining Investment Road Map" and instructed their employees to adhere to it strictly (CWS-1 Anderson, para. 85). Further, as to the Claimants' contention that the Documents are relevant to the Claimants' case on estoppel, preclusion and acquiescence, the Claimants have	for non-production on this DPR because the State will not have proven its case on the Mining Investment Road Map, the Claimants will be deprived of relevant evidence for their case on estoppel, preclusion and acquiescence (as to which, see the Claimants' reply under DPR 10 above). For the record, the Claimants dispute the State's contention that they have " <i>sought to resile</i> " from their position vis-a-vis the Mining Investment Road	

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					not to date pleaded any such case. Until such time as the Claimants provide a full explanation and particulars of their case on estoppel, preclusion and acquiescence, and the legal basis for it, the State reserves its position on the extent to which the requested Documents are relevant or material to the outcome of those arguments.	Map " <i>set out the steps for obtaining a mining licence</i> ", that is clearly not correct. To say that a document " <i>sets out steps</i> " is obviously not the same as saying that the document posits " <i>mandatory legal requirements</i> ". The Claimants maintain this DPR in full.	
c. NEMA							
21.	CI	Documents created by or for NEMA during the Relevant Period that record or reflect the analysis by NEMA (internally or in conjunction with other	As part of the State's Illegality Objection and its defence on the merits, the State alleges that CMK's application for a mining licence was incomplete (State's	The requested Documents are relevant and material to the State's Illegality Objection and the Claimants' case on estoppel, preclusion and	The State objects to this request on the following basis: i. the Claimants are already in the possession	The Claimants do not accept the State's objections to producing the requested Documents.	Given the reliance of the Respondent on NEMA's role in the illegality objection, the Claimants are entitled to documents in the possession,

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		Relevant Government Agencies) concerning the extent to which CMK's application for a mining licence over Mrima Hill was missing any information or document required by the Mining Act, the Mining Regulations or other applicable laws or regulations.	Counter-Memorial, para 102 <i>et seq</i>).	acquiescence. These Documents will go towards proving or disproving the State's argument that CMK's application for a mining licence was incomplete and, if it was, the extent (if any) of the action that officials at the DMG took in response. If the DMG identified areas in which CMK's application was incomplete but took no action, then that will be relevant to the Claimants' case on estoppel, preclusion and acquiescence.	of the letter from Professor Wahungu to CMK dated 22 March 2013 by which CMK's application for an EIA licence was categorically rejected; and ii. the requested Documents are not sufficiently relevant or material to the State's Illegality Objection. The State contends that CMK's application for a mining licence was incomplete due to CMK's failure to obtain an EIA	While the Claimants do have a copy of Professor Wahungu's 22 March 2013 letter, they also have other letters subsequent to that date that indicate the 22 March 2013 decision was reviewed and ultimately overturned (see, Exhibits C-91 and R-056). In light of this, the requested Documents are necessary to prove or disprove the State's allegation that the Claimants' application for a mining licence was incomplete for want of NEMA	custody or control of NEMA itself (i.e. not including other "Relevant Government Agencies") that record or reflect the analysis of NEMA of deficiencies or omissions of the CMK application for a <i>mining</i> licence over Mrima Hill, DPR 11 is GRANTED in part

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					<p>licence in relation to Mrima Hill (amongst other issues) (State's Counter-Memorial, para. 107). Whether CMK's application for a mining licence was incomplete is an objective question under Kenyan law and the State's subjective state of awareness, and the action that officials at the NEMA took in respect of the legality of CMK's application, is not relevant to the determination of that issue. Accordingly this ground for the Claimants' document request is rejected.</p> <p>As to the Claimants' contention that the Documents are</p>	<p>approval.</p> <p>The Claimants also repeat their comments under DPR 13 above regarding the State's apparent attempt to rely on the circumstantial nature of its case to avoid producing documents. If (as the State now says) the requested Documents are not relevant and material to the State's illegality case, the State should withdraw its allegations that CMK's application for a mining licence was deficient for lack of NEMA approval.</p>	

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					<p>relevant to the Claimants' case on estoppel, preclusion and acquiescence, the Claimants have not to date pleaded any such case. Until such time as the Claimants provide a full explanation and particulars of their case on estoppel, preclusion and acquiescence, and the legal basis for it, the State reserves its position on the extent to which the requested Documents are relevant or material to the outcome of those arguments.</p>	<p>As to the State's contention that its illegality case is subject to an objective test alone, that is not credible (see the Claimants' reply under DPR 3 above). In any event, the requested Documents not only evidence the State's subjective state of awareness, but also evidence facts from which any determination as to compliance or non-compliance with Kenyan law can be made.</p> <p>Further, these documents are also relevant and material to the</p>	

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						<p>issue of how NEMA and other Relevant Government Agencies conducted themselves (if indeed CMK's application was incomplete). This is part of the Claimants' case on estoppel, preclusion and acquiescence (as to which, see the Claimants' reply under DPR 10 above).</p> <p>Accordingly, the Claimants maintain this request.</p>	
22.	CI	Documents created by NEMA or other Relevant Government Agencies recording or reflecting	As part of the State's Illegality Objection, the State alleges that " <i>CMK never received an EIA</i>	These documents are relevant and material to the State's Illegality Objection, namely the State's	The State objects to the production of the requested Documents on the basis that the	The Claimants do not accept the State's objections to this DPR or the	DP2 22 is to be read together with DPR 21. In light of the reliance placed by

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		<p>NEMA practice or protocol for the assessment and processing of applications or approvals relating to mining projects (including, without limitation, processing of EIAs or ESIA's) during the Relevant Period.</p>	<p><i>licence from NEMA and, therefore, could never lawfully have been granted a valid mining licence</i>" (State's Counter-Memorial, para 108).</p> <p>As part of the State's Corruption Objection, the State speculates that <i>"Mr. Juma could leverage his government connections to overcome the objections of NEMA and the Ministry of Mining, and influence the issuance of the EIA licence and the mining licence on condition that Mr. Juma received a cut of the deal"</i> (State's Counter-Memorial at para 28).</p>	<p>contention that SML 351 was void for lack of an approved EIA and other NEMA consents.</p> <p>In order to test this assertion, the Claimants need documents that show the regular NEMA process for handling applications for approvals relating to mining projects, and EIA/ESIA applications in the Relevant Period.</p> <p>The extent of which NEMA was (and could have been) a barrier to the grant of CMK's mining licence is also relevant and potentially material to the State's Corruption Objection given that the State cites NEMA's objections as a motivating factor for the Claimants to enter into an allegedly corrupt scheme to procure</p>	<p>burden on the State to identify and produce such Documents is disproportionate, and if Documents were to be produced, if any, such Documents would not be material to the outcome of this case.</p> <p>In particular, the Claimants are seeking a search to be undertaken for all Documents that <i>"record or reflect"</i> NEMA practice or protocol. The State considers that this is an extremely broad request and would put an unreasonable burden on the State to search all potentially responsive</p>	<p>State's proposal for the narrowing-down of this DPR.</p> <p>A key part of the State's broad-ranging illegality case is the allegation that SML 351 was void for lack of an approved EIA and other NEMA consents (which, according to the State, were part of the <i>"mandatory requirements"</i> CMK had to meet before it got a special mining licence).</p> <p>The documents requested in this DPR are relevant and material to this issue because they</p>	<p>the respondent on the illegality objection, the Claimant is entitled to documents in NEMA'S possession, custody or control recording its practices or protocols for the assessment and processing of applications or approvals relating to mining projects, including any practice or protocol for processing EIAs or ESIA's during the Relevant Period.</p> <p>DPR 22 is GRANTED in part.</p>

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				<p>SML 351.</p>	<p>documents of eight Relevant Government Agencies.</p> <p>Further, practice and procedures in relation to the assessment and processing of applications for EIA/ESIA licences are set out in statute and regulations, including the Environmental Management and Coordination Act, 1999 and the Environmental (Impact and Assessment) Regulations 2003.</p> <p>The State contends that the Claimants' document request can be substantially</p>	<p>will show the regular NEMA process for handling applications for approvals relating to mining projects, and EIA/ESIA applications in the Relevant Period.</p> <p>The State cannot complain about the breadth of a DPR when it has brought an illegality case that is so broad. If the State intends to maintain its broad-ranging illegality case, it must bear the consequences in terms of document production obligations.</p> <p>As to the State's</p>	

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					<p>satisfied by a narrower search for any official NEMA protocol Document(s) that records NEMA's procedures for assessing and processing approvals related to mining projects. Further, the State contends that the scope can also be narrowed to such Documents that only concern approvals relating to prospecting licences and mining licences (rather than any broader category).</p> <p>Therefore, the State agrees to undertake reasonable searches for any official NEMA protocol Document(s)</p>	<p>proposal to narrow-down to produce "<i>any official NEMA protocol</i>", that is concerning to the Claimants as it raises the issue of whether there were unofficial protocols in place inside NEMA during the Relevant Period.</p>	

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					produced during the Relevant Period that record the procedure for assessing and approving EIA and/ or ESIA applications relating to prospecting licences and mining licences, and to produce any responsive Documents that are in the State's custody, possession or control.		
23.	CI	Each EIA/ESIA approval letter signed by Professor Wahungu during the Relevant Period.	The Claimants rely on two letters from NEMA dated 8 July 2013 (Exhibit C-91 and Exhibit R-056) as evidence that NEMA approved of CMK's activities at Mrima Hill and approved CMK's EIAs. As part of the State's Illegality Objection, the State's	The requested Documents are relevant and material to the State's Illegality Objection because they will show how often Professor Wahungu signed letters personally and, therefore, whether the absence of his signature was irregular or not. This will in turn bear on whether it was reasonable for the	The State objects to this request on the following basis: <ul style="list-style-type: none"> i. the scope of the document request is unreasonably broad; ii. the Documents requested are 	The Claimants do not accept the State's objections. By alleging that the two 8 July 2013 letters are not signed by the proper person the State has put Professor Wahungu's	DRP 23 lacks materiality and is too broad and burdensome in excess of any potential probative value. DPR 23 is REFUSED.

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			<p>witness, Professor Wahungu, alleges that the 8 July letters are "unprocedural" and issued without Professor Wahungu's authority: <i>"The two letters dated 8 July 2013 were issued without my authority. In practice, all important decisions within NEMA, including the issuance of EIA licences, are reserved for the office of Director-General"</i> (RWS-1 Wahungu, para 40). Based on this evidence, the State argues that because the letters were signed by Benjamin Langwen (Director of Compliance and Enforcement) on behalf of Professor Wahungu and not by Professor Wahungu, they cannot be relied on by the Claimants (State's</p>	<p>Claimants to rely on letters from NEMA signed by the Director of Compliance and Enforcement with regard to their EIA/ESIA applications. For the same reasons, the requested Documents are relevant and material to the State's defence on the merits.</p> <p>The requested Documents are also relevant to relevant and material to the Claimants' case on estoppel, preclusion and acquiescence because the Claimants relied on representations made on behalf of NEMA (including that NEMA approved CMK's EIA/ESIA applications).</p>	<p>not sufficiently relevant or material to the outcome of the case; and</p> <p>iii. it is a fishing expedition.</p> <p>The scope of the request is unreasonably broad as it would require a search for all Documents relating to projects for which NEMA approval was required, far beyond those NEMA approvals in the mining sector, or more particularly related to Mrima Hill.</p> <p>Further, the State's position is that under Kenyan law all</p>	<p>approval of EIA's/ESIA's directly into issue as part of its wide-ranging illegality case.</p> <p>The requested Documents are, therefore, relevant and material. Unless the State withdraws its allegation that the 8 July 2013 letters were not signed by the proper person, the State must produce the requested Documents.</p> <p>The Claimants' request is neither unreasonably broad nor a fishing expedition. The request is simply to</p>	

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			<p>Counter-Memorial, para 142).</p> <p>The State's Illegality Objection is also part of its merits defence. Specifically, the State alleges that purported deficiencies regarding CMK's EIA approval status are connected to the existence of a public purpose behind the State's revocation of SML 351 (State's Counter-Memorial, paras 402-403).</p>		<p>decisions made in relation to EIA/ESIA approvals are reserved for the Director-General or NEMA (RWS-1 Wahungu. para. 40). The existence of letters that are signed by anyone other than the Director-General of NEMA would not establish whether such letters were issued with Professor Wahungu's authority or not. Similarly, the frequency with which Professor Wahungu signed letters personally would not be determinative of whether any EIA/ESIA approval was lawfully granted to CMK. Accordingly, these</p>	<p>allow a fair assessment of the State's allegation that Mr Langwen's signing of the 8 July 2013 Letters was "<i>unprocedural</i>".</p> <p>The requested Documents are also obviously relevant to the Claimants' case on estoppel, preclusion and acquiescence (as to which, see the Claimants' reply under DPR 10 above).</p> <p>The Claimants maintain this DPR.</p>	

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					<p>Documents are not sufficiently relevant or material to the outcome of the case.</p> <p>This document request is a fishing expedition by the Claimants to obtain material to support an unsubstantiated case that the letters of 8 July 2013 amount to EIA/ESIA approval on behalf of NEMA, notwithstanding the categorical rejection of CMK's application and EIA licence in Professor Wahungu's letter dated 22 March 2013.</p> <p>As to the Claimants' contention that the Documents are relevant to the</p>		

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					Claimants' case on estoppel, preclusion and acquiescence, the Claimants have not to date pleaded any such case. Until such time as the Claimants provide a full explanation and particulars of their case on estoppel, preclusion and acquiescence, and the legal basis for it, the State reserves its position on the extent to which the requested Documents are relevant or material to the outcome of those arguments.		
24.	CI	Copies of each EIA/ESIA approval letter signed by Benjamin Langwen (including EIA/ESIA approval letters signed by	As part of their claim on the merits, the Claimants rely on two letters from NEMA dated 8 July 2013 (Exhibit C-91 and	The requested Documents are relevant and material to the Claimants' claims, as part of which the Claimants contend that they had the	The State objects to this request on the following basis: i. the scope of the	The Claimants do not accept the State's objections to producing the requested	The letters of 8 July 2013 were issued under the signature of Benjamin Langwen, and the

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		Mr Langwen on behalf of the Director-General) from the date of his first employment at NEMA to his dismissal on 16 December 2013.	<p>Exhibit R-056) as evidence that NEMA approved of CMK's activities at Mrima Hill and approved CMK's EIAs.</p> <p>As part of the State's Illegality Objection, the State's witness, Professor Wahungu alleges that the 8 July letters are "unprocedural" and issued without Professor Wahungu's authority: <i>"The two letters dated 8 July 2013 were issued without my authority. In practice, all important decisions within NEMA, including the issuance of EIA licences, are reserved for the office of Director-General"</i> (RWS-1 Wahungu, para 40). Based on this evidence, the State</p>	<p>necessary NEMA approvals for the Mrima Hill project and a legitimate expectation that the project could proceed.</p> <p>These documents are also relevant and material to the State's Illegality Objection because they will show how often Benjamin Langwen signed letters personally and, therefore, whether the absence of his signature is irregular or whether it was reasonable for the Claimants to rely on letters from NEMA signed by the Director of Compliance and Enforcement with regard to their EIA/ESIA applications. For the same reasons, the requested Documents are relevant and material to the State's defence on the merits.</p> <p>The requested Documents</p>	<p>document request is unreasonably broad;</p> <p>ii. the Documents requested are not sufficiently relevant or material to the outcome of the case; and</p> <p>iii. it is a fishing expedition.</p> <p>The scope of the request is unreasonably broad as it would require a search for all documents relating to projects for which NEMA approval was required, far beyond NEMA approvals issued in the mining sector, or more</p>	<p>Documents.</p> <p>The requested Documents are relevant and material given the State's allegation that the 8 July 2013 letters were "unprocedural" as they were signed by Mr Langwen.</p> <p>Unless the State withdraws the allegation, the requested Documents must be produced.</p> <p>Given the extent of the State's reliance on the fact Mr Langwen signed the 8 July 2013 letters, the scope of the DPR, is not unreasonably broad</p>	<p>Respondent's position is that Mr. Langwen's signature did not comply with the legal requirements. This issue does not require such a broad production order.</p> <p>DPR 24 is REJECTED.</p>

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			<p>argues that because the letters were signed by Benjamin Langwen (Director of Compliance and Enforcement) on behalf of Professor Wahungu and not by Professor Wahungu, they cannot be relied on by the Claimants (State's Counter-Memorial, para 142).</p> <p>The State's Illegality Objection is also part of its merits defence. Specifically, the State alleges that purported deficiencies regarding CMK's EIA approval status are connected to the existence of a public purpose behind the State's revocation of SML 351 (State's Counter-Memorial, para 402).</p>	<p>are also relevant and material to the Claimants' case on estoppel, preclusion and acquiescence because the Claimants relied on representations made on behalf of NEMA (including that NEMA approved CMK's EIA/ESIA applications).</p> <p>The requested Documents are also relevant and material to the related question of whether Mr Langwen acted with actual (delegated) authority when he issued the July 2013 approval letters to CMK.</p>	<p>particularly related to Mrima Hill.</p> <p>Further, the State's position is that under Kenyan law all decisions made in relation to EIA/ESIA approvals are reserved for the Director-General of NEMA (RWS-1 Wahungu. para. 40) and therefore, any letters issued by Benjamin Langwen without the Director-General's authority were "<i>issued unlawfully</i>" (RWS-1 Wahungu, para. 41). Accordingly the existence of letters signed by anyone other than the Director-General of NEMA would not establish whether</p>	<p>or disproportionate.</p> <p>Further, it is unreasonable of the State to suggest that the Claimants are engaging in a fishing expedition "<i>to obtain material to support an unsubstantiated case</i>". The 8 July 2013 letters were issued by NEMA. The State does not deny that – the State rather alleges they are "<i>unprocedural</i>". In making this obtuse allegation, the State has raised the question of what a "<i>procedural</i>" EIA/ESIA approval letter would look like. The only way to resolve that issue</p>	

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					<p>such letters were issued with Professor Wahungu's authority or not. Furthermore, the existence of any responsive Documents which the Claimants were not a party to or in receipt of at the relevant time(s) cannot give rise to legitimate expectations on the part of the Claimants or inform the question of whether the Claimants alleged reliance on letters signed by Mr Langwen was reasonable. Accordingly, these Documents are not sufficiently relevant or material to the outcome of the case.</p>	<p>is with a reliable sample of comparator EIA/ESIA approval letters, including those signed by Mr Langwen.</p> <p>The requested Documents are also obviously relevant to the Claimants' case on estoppel, preclusion and acquiescence (as to which, see the Claimants' reply under DPR 10 above).</p> <p>The Claimants maintain this DPR.</p>	

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					<p>This document request is a fishing expedition by the Claimants to obtain material to support an unsubstantiated case that the letters of 8 July 2013 amount to EIA/ESIA approval on behalf of NEMA, notwithstanding the categorical rejection of CMK's application and EIA licence in Professor Wahungu's letter dated 22 March 2013.</p> <p>As to the Claimants' contention that the Documents are relevant to the Claimants' case on estoppel, preclusion and acquiescence, the Claimants have not to date pleaded</p>		

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					any such case. Until such time as the Claimants provide a full explanation and particulars of their case on estoppel, preclusion and acquiescence, and the legal basis for it, the State reserves its position on the extent to which the requested Documents are relevant or material to the outcome of those arguments.		
25.	CI	EIA/ESIA approval letters signed by any person other than the Director-General of NEMA (including where signed by another person on behalf of the Director-General of NEMA) from 2003 to present.	As part of their claim on the merits, the Claimants rely on two letters from NEMA dated 8 July 2013 (Exhibit C-91 and Exhibit R-056) as evidence that NEMA approved of CMK's activities at Mrima Hill and approved of CMK's	EIA/ESIA approvals signed by persons other than the Director-General of NEMA are relevant and material to show whether the absence of the Director-General's signature made these letters irregular (as the State suggests) and whether Mr Langwen or any other of the	The State objects to this request on the following basis: i. the scope of the document request is unreasonably broad;	The Claimants do not accept the State's objection to this DPR. As noted in the Claimants' replies to DPRs 23 and 24 above, the State must accept the	The issue here is the authority of Mr. Benjamin Langwen. Accordingly, production of approval letters signed by persons other than the Director General or the Director of

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			<p>EIA applications.</p> <p>As part of the State's Illegality Objection, the State's witness, Professor Wahungu alleges that the 8 July letters are "unprocedural" and issued without Professor Wahungu's authority: <i>"The two letters dated 8 July 2013 were issued without my authority. In practice, all important decisions within NEMA, including the issuance of EIA licences, are reserved for the office of Director-General"</i> (RWS-1 Wahungu, para 40). Based on this evidence, the State argues that because the letters were signed by Benjamin Langwen (Director of Compliance and Enforcement) on</p>	<p>Director-General's subordinates at NEMA enjoyed delegated authority to sign letters of this kind.</p> <p>The requested Documents are also relevant and material to the Claimants' FET case and their case on estoppel, preclusion and acquiescence. The Claimants relied on representations made by NEMA (including in the 8 July 2013 letters signed by Mr Langwen). As these documents will reveal the extent to which NEMA officials such as Mr Langwen had delegated authority, they are also relevant to the reasonableness of the Claimants' reliance on the representations made to them by NEMA officials below the rank of Director-</p>	<p>ii. the Documents requested are not sufficiently relevant or material to the outcome of the case; and</p> <p>iii. it is a fishing expedition.</p> <p>The scope of the request is unreasonably broad as it would require a search for documents relating to all projects for which NEMA approval was required over a 14 year period, far beyond NEMA approvals issued in the mining sector, or more particularly related to Mrima Hill.</p>	<p>document production consequences of its broad allegation that the EIA/ESIA approval letters issued to CMK were "unprocedural" because they were not signed by Professor Wahungu. In making this allegation, the State has put directly in issue the question of whether, at any point during his tenure as Director-General of NEMA, Professor Wahungu ever authorised other NEMA officials (including Mr Langwen) to sign EIA/ESIA approvals on his</p>	<p>Compliance and Enforcement is excessively broad and not of sufficient probative value.</p> <p>DPR 25 is REJECTED.</p>

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			Reference to Submissions	Comments			
			<p>behalf of Professor Wahungu and not by Professor Wahungu, they cannot be relied on by the Claimants (State's Counter-Memorial, para 142).</p> <p>The State's Illegality Objection is also part of its merits defence. Specifically, the State alleges that purported deficiencies regarding CMK's EIA approval status are connected to the existence of a public purpose behind the State's revocation of SML 351 (State's Counter-Memorial, para 402).</p>	General.	<p>Further, the State's position is that under Kenyan law all decisions made in relation to EIA/ESIA approvals are reserved for the Director-General of NEMA (RWS-1 Wahungu. para. 40) and therefore, any letters issued by any person other than the Director-General of NEMA without the Director-General's authority were issued unlawfully. The existence of any such letters would not establish whether such letters were issued with Professor Wahungu's authority or not or whether officials, such as Mr Langwen in fact had delegated authority.</p>	<p>behalf. If he did, then the fact the two letters dated 8 July 2013 were not signed by Professor Wahungu will not mean they are "unprocedural", or that any inference of misconduct or corruption can be drawn.</p> <p>The requested Documents are also relevant to the Claimants' case on estoppel, preclusion and acquiescence (as to which, see the Claimants' reply under DPR 10 above).</p> <p>The Claimants maintain this DPR.</p>	

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					<p>Furthermore, the existence of any responsive Documents which the Claimants were not a party to or in receipt of at the relevant time(s) cannot give rise to legitimate expectations on the part of the Claimants or inform the question of whether the Claimants alleged reliance on letters signed by persons other than the Director-General of NEMA was reasonable. Accordingly, these Documents are not sufficiently relevant or material to the outcome of the case.</p> <p>This document</p>		

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					<p>request is a fishing expedition by the Claimants to obtain material to support an unsubstantiated case that the letters of 8 July 2013 amount to EIA/ESIA approval on behalf of NEMA, notwithstanding the categorical rejection of CMK's application and EIA licence in Professor Wahungu's letter dated 22 March 2013.</p> <p>As to the Claimants' contention that the Documents are relevant to the Claimants' case on estoppel, preclusion and acquiescence, the Claimants have not to date pleaded any such case. Until</p>		

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					such time as the Claimants provide a full explanation and particulars of their case on estoppel, preclusion and acquiescence, and the legal basis for it, the State reserves its position on the extent to which the requested Documents are relevant or material to the outcome of those arguments.		
26.	CI	A complete copy of the file created by any of the Relevant Government Agencies or the Kenyan police or anti-corruption authorities (or other investigative bodies) during the investigation of Benjamin Langwen for gross misconduct, including the documents	As part of the State's Illegality Objection, the State alleges that NEMA's EIA approvals issued on 8 July 2013 were irregular and connects the allegation with the fact that Benjamin Langwen was summarily dismissed in December 2013 for	The Documents are relevant and material to the State's Illegality Objection because they will demonstrate whether or not Benjamin Langwen's dismissal in December 2013 was in actual fact related to the EIA approvals granted to CMK in July 2013 or whether it was based on	The State agrees to undertake reasonable searches for the requested Documents and will produce all responsive Documents that are in the State's custody, possession or control. These Documents have	The Claimants do not accept the State's proposed production. The State's attempt to withhold Documents on the basis they are unrelated to CMK and/or Mrima Hill	The Tribunal notes the Respondent's undertaking and the limits on that undertaking and rules as follows; 1. The Claimants are not entitled to police files or the files of other enforcement

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		referred to by Professor Wahungu as recording that Mr Langwen was found to have " <i>deliberately misled the office of the Director General</i> ".	gross misconduct (State's Counter-Memorial, para 142). Professor Wahungu alleges that Mr Langwen was found to have " <i>deliberately misled the office of the Director General</i> ". (RWS-1 Wahungu, para 42).	other allegations or events.	been redacted to remove sections that are unrelated to CMK and/or Mrima Hill and are confidential, and some of the Documents are incomplete. The Kenyan police and anti-corruption authorities (and other investigative bodies) ⁵ are independent agencies, and are not under the direction or control of the Government. ⁶ Accordingly, it is not in the State's power to compel those	is unacceptable. The State has put Mr Langwen's character and conduct directly in issue. This goes beyond his involvement with the Claimants or their project. The State must accept the document production consequences of the broad (and very serious) allegations it makes. Further, by making the allegations against Mr Langwen, the State has waived confidentiality over	authorities. 2. The Claimants are entitled to the document(s) referred to by Professor Wahungu alleging that Mr. Langwen "deliberately misled the Office of the Director General" (Professor Wahungu) provided such documented allegations were made in relation to the Mrima Hill Project. 3. The Tribunal rejects the Respondent's claim

⁵ The Public Service Commission and the National Police Service Commission are created and provided for under Article 248 of the Constitution of Kenya, 2010 (the "**Constitution**"). The Office of the Director of Public Prosecutions is established by Article 157 of the Constitution, while the Ethics and Anti-Corruption Commission is provided for under Article 79 of the Constitution.

⁶Article 249(2) of the Constitution.

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					agencies to produce any responsive Documents.	<p>Documents going to that issue. It would be grossly unfair if the State was allowed to withhold or redact these Documents on the basis of confidentiality. However, if the State is genuinely concerned about confidentiality, the Claimants are willing to provide the necessary undertakings.</p> <p>Accordingly, the Claimants request the State produce all requested Documents irrespective of whether they relate to CMK or Mrima Hill.</p>	<p>to suppress any such documents based on the internal independence of the police and investigators who are nevertheless state actors from the international law perspective.</p> <p>4. In relation to the documents covered by this order, the Tribunal rejects the Respondent's claim.</p> <p>DPR is GRANTED in part.</p>

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						As to the State's suggestion that it may not produce documents responsive to this DPR because it is not in the State's power to compel the Kenyan police and anti-corruption authorities to produce the documents, that is irrelevant. The Republic of Kenya participates in this arbitration as a single entity. Any Documents within such agencies are within the custody, possession or control of the Republic of Kenya. The State plainly cannot use its own internal constitutional	

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						arrangements to evade an obligation to produce documents that arises under international law. To allow the State to gain a forensic advantage from its own internal law would not only offend basic principles of international law, but it would also be manifestly unfair to the Claimants.	
27.	CI	Documents within the possession, custody or control of the Relevant Government Agencies that record or discuss Benjamin Langwen's reinstatement following his dismissal from office in December 2013.	As part of the State's Illegality Objection, the State says that Benjamin Langwen was summarily dismissed in December 2013 for gross misconduct (State's Counter-Memorial, para 142). However, Mr Langwen	The requested Documents are relevant and material to the State's Illegality Objection, an important part of which is the State's allegation that SML 351 was void or incapable of being granted because of a lack of approval from	The State objects to this request on the basis that: <ul style="list-style-type: none"> i. the scope of the document request is unreasonably broad; 	In the State's Counter-Memorial, the State cast aspersions on Mr Langwen's character and conduct without mentioning that Mr Langwen was reinstated by the	The Claimants' request is framed too broadly. However the Claimants are entitled to any official document publically announcing or explaining the reasons for Benjamin

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			was reinstated by the Kenyan Industrial Court and his dismissal described as " <i>malicious and unfair</i> " (Claimants' Counter-Memorial on Preliminary Objections, para 228; Exhibit C-288).	<p>NEMA.</p> <p>The State has alleged that Mr Langwen (the person who signed the NEMA approval letters issued to CMK on 8 July 2013) acted improperly in issuing CMK's EIA approvals and that he was later dismissed for gross misconduct.</p> <p>These Documents will show whether or not the specific allegations that were made against Mr Langwen as part of his dismissal were in fact connected to CMK's EIA approvals.</p>	<p>ii. the Documents requested are not sufficiently relevant or material to the outcome of the case;</p> <p>iii. the judgments of the Kenyan Industrial Court are in the public domain; and</p> <p>iv. the State has agreed to conduct reasonable searches and produce Documents that are responsive to Claimants' DPR 26.</p> <p>In particular, the request is</p>	<p>Kenyan Industrial Court and his dismissal described as "<i>malicious and unfair</i>".</p> <p>Given this serious omission, it is critical that the State produce all documents responsive to this DPR – otherwise, the Claimants and the Tribunal may not know what other information the State has withheld concerning Mr Langwen.</p> <p>As to the State's position that "<i>the Documents requested are not sufficiently relevant or material to the</i></p>	Langwen's reinstatement.

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					<p>unreasonably broad as the Documents have not been requested by reference to a period of time or specific Relevant Government Agency. Furthermore, this request is repetitive, as any relevant Documents would have been captured under the Claimants' DPR 26, which the State has voluntarily agreed to produce.</p> <p>The circumstances of Benjamin Langwen's reinstatement are not sufficiently relevant or material, to these proceedings. In particular, Mr Wahungu has explained that Mr Langwen was</p>	<p><i>outcome of the case"</i>, the Claimants repeat their comments under DPR 13 above. The State seems to be trying to use the circumstantial nature of its illegality case to evade its document production obligations.</p> <p>The requested Documents plainly are relevant to Mr Langwen's character, including the circumstances of his dismissal and reinstatement. If the State intends to maintain its position that this issue is not material, the State</p>	

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					<p>dismissed on account of "<i>gross misconduct</i>" in respect "<i>of the processing of an EIA licence for <u>another</u> company</i>" (emphasis added) (RWS-1 Wahungu, para. 42). Therefore, any Documents related to his reinstatement are only relevant to his processing of an EIA licence for <u>another</u> company, not CMK. They are therefore not sufficiently relevant or material to the question of whether Mr Langwen improperly issued CMK EIA approvals.</p> <p>Further, the Claimants state that Benjamin Langwen</p>	<p>should withdraw its allegations regarding Mr Langwen's dismissal. Otherwise, the State should produce the requested Documents.</p> <p>Further, this DPR is not unreasonably broad. It relates to Documents concerning a specific event at a specific time.</p> <p>The State's attempt to explain the allegations of gross misconduct against Mr Langwen as limited to the affairs of another company is inconsistent with</p>	

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					<p>was reinstated by the Kenyan Industrial Court. Rulings and judgments of Kenyan courts are accessible in the public domain, either by inclusion in the Kenyan Law Reports or by a formal request filed with the Kenyan Court archives.</p>	<p>the way the State has deployed the evidence at paragraph 142 of its Counter-Memorial. It is Mr Langwen's character and general conduct the State has put into issue, and it must produce in corresponding breadth.</p> <p>As to the State's suggestion that the documents in this DPR may be obtained through a "formal request filed with the Kenyan Court archives", that is irrelevant as this DPR is not just for documents from the Kenya</p>	

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						Industrial Court.	
28.	CI	Copies of 'Records of Decision' issued by the Director-General of NEMA under Regulations 23 and 46(1) of the <i>Environmental (Impact Assessment and Audit) Regulations 2003</i> during the Relevant Period.	As part of the State's Illegality Objection, the State has alleged that the Director-General of NEMA " <i>categorically rejected CMK's application for an EIA licence</i> [for Mrima Hill]" (State's Counter-Memorial, para 138). According to the State, NEMA's rejection was final because the 22 March 2013 letter by which it was communicated (Exhibit R-011) was a "Record of Decision" that could not be reversed (RWS-1 Wahungu, paras 33-34).	These 'Records of Decision' are relevant and material to the State's Illegality Objection, an important part of which is the State's allegation that SML 351 was void or incapable of being granted because of a lack of approval from NEMA. The State has alleged that the NEMA approval letters issued to CMK on 8 July 2013 were invalid because they contradicted an earlier "Record of Decision". However, the 22 March 2013 letter that the State alleges was a 'Record of Decision' does not describe itself in that way and does not reference the regulations referred to by Professor Wahungu.	The State objects to this request on the basis that: i. the Documents are not sufficiently relevant or material to the outcome of the case; and ii. the burden on the State to identify and produce such Documents is disproportionate and unreasonable. There is no standard form for a "Record of Decision" and therefore production of the requested	The Claimants do not accept the State's objections to producing the requested Documents. Regarding the State's contention that " <i>the Documents are not sufficiently relevant or material to the outcome of the case</i> ", the Claimants repeat their comments under DPR 13 above. The State seems to be trying to use the circumstantial nature of its illegality case to evade its document production	The request as framed is too broad, burdensome and lacks materiality. However, in light of the Respondent's objection based on the , the manner and form of "records of decision" issued by NEMA, the Respondent is to produce: 1. any NEMA protocol or statement of practice dealing with the "manner and form" of "records of decision"; 2. that were applicable in the period 1 January 2012 until 31

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				<p>Accordingly, these documents are needed to test the State's characterisation of the 22 March 2013 letter as a 'Record of Decision': they will show what a 'Record of Decision' looks like.</p>	<p>Documents would not prove or disprove whether the letter dated 22 March 2013 was in fact a "Record of Decision". Accordingly, the requested Documents lack relevance and materiality.</p> <p>In addition, as there is no standard form of decision, if all decisions of NEMA under these Regulations were to be produced, there would be a disproportionate burden on the State to identify and produce all "Records of Decisions" for all projects for which NEMA approval was required, far beyond those issued in the</p>	<p>obligations.</p> <p>The State's characterisation of NEMA's 22 March 2013 letter as a "<i>Record of Decision</i>" is central to the State's Illegality Objection. However, the words "<i>Record of Decision</i>" do not appear anywhere on the letter. Accordingly, the manner and form of "<i>Records of Decision</i>" issued by the Director-General of NEMA is relevant and material to the State's allegation. Unless the State withdraws its reliance on the 22</p>	<p>December 2013; and</p> <p>3. to the mining sector including Mrima Hill.</p> <p>DPR 28 is GRANTED in part.</p>

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					<p>mining sector, or more particularly related to Mrima Hill. Furthermore, the search would be unreasonably broad as it would require searches of Documents relating to a period of seven years.</p>	<p>March 2013 letter as part of the State's Illegality Objection, the Claimants maintain their request.</p> <p>Given the purported determinative effect of "Records of Decision", such Documents should be readily identifiable – i.e. one would think that they would be the last document in the file. In light of this, and the weight the State places on the 22 March 2013 letter being a "Record of Decision", the request does not place a disproportionate or</p>	

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			Reference to Submissions	Comments			
						<p>unreasonable burden on the State.</p> <p>The relevance and materiality of this request has also been heightened by the State's admission in its response that there is "<i>no standard form</i>" for a "<i>Record of Decision</i>".</p> <p>Accordingly, the Claimants maintain this DPR in full.</p>	
29.	CI	Documents within the possession, custody or control of the Relevant Government Agencies that record or reflect the work of the Technical Advisory Committee (TAC) constituted to assist	As part of the State's Illegality Objection, the State asserts that " <i>the Claimants knew or ought to have known that the licence had not been issued in accordance with Kenyan</i>	The scope and quality of TAC's consideration of CMK's EIA application is relevant and material to whether NEMA's approval of CMK's EIA was irregular as the State contends. If these documents show that	The State objects to this request on the same grounds as set out in response to the Claimants' DPR 21 above. Further, in any event,	The Claimants do not understand the State's objection to this DPR. The State's cross-reference to its objections to DPR	The Claimants are entitled to documentation of the input of the Technical Advisory Committee provided to the management of NEMA (i.e. not

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		NEMA with the consideration of CMK's EIA application in 2012.	<i>law</i> " (State's Counter-Memorial, para 137) and alleges that NEMA's EIA approvals issued on 8 July 2013 were irregular (State's Counter-Memorial, para 142). According to the State, the TAC was involved in the assessment of CMK's EIA (RWS-1 Wahungu, para 27).	<p>the TAC fully considered CMK's EIA and the responses CMK provided to the TAC's queries, then that would suggest the approval of CMK's EIA was not irregular at all.</p> <p>Further, these Documents will show the nature and extent of the Claimants' interactions with the TAC. This in turn is relevant to whether the Claimants knew or ought to have known that SML 351 had not been issued in accordance with Kenyan law.</p>	the requested Documents are not sufficiently material to the outcome of the case as the work as of the TAC would have already been reflected in the position taken by NEMA in relation to CMK's mining licence application.	21 does not make sense, as DPR 21 is concerned with very different documents (DPR 21 is for documents concerning the extent to which CMK's application for a <i>mining licence</i> was missing any information). This DPR is for documents relating to CMK's <i>EIA application</i> .	the technical files themselves) in respect of NEMA's consideration of CMK's EIA application in 2012 in the possession, custody or control of NEMA . The Tribunal does not accept as reasonable or proportionate the broad sweep of nine relevant government agencies swept up in DPR 29. Nor, on the other hand, does the Tribunal accept the Respondent's argument that the TAC material would "have already been reflected in the position taken by NEMA". NEMA may or may not have accepted the input of

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						<p><i>licence application</i>", the State misses the point. This DPR is not seeking documents that record the final position taken by NEMA, but rather documents that record the process that led to the final decision, including the part of the process that involved the TAC. As the Claimants explained in their comments on this DPR, if these documents show that the TAC fully considered CMK's EIA and the responses CMK provided to the TAC's queries, then that would suggest</p>	<p>the TAC. DPR 29 is GRANTED in part.</p>

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			Reference to Submissions	Comments			
						<p>the approval of CMK's EIA was not irregular as the State now alleges.</p> <p>Further, these documents will show whether NEMA acted in accordance with the TAC's recommendations.</p> <p>The Claimants maintain this DPR.</p>	
30.	CI	The archaeological assessment carried out by the NMK team referred to in the letter from NMK to CMK dated 5 February 2013 (Exhibit R-009).	As part of the State's Illegality Objection, the State relies on the allegedly "conditional" consent issued by NMK to CMK on 5 February 2013 (State's Memorial paras 117 and 178.2). The State's witness, Mr Farah, also relies on the NMK letter of 5 February in support of	The requested Document is relevant and material to the question as to what extent (if at all) CMK was non-compliant with conditions imposed by NMK and the level of concern that NMK had over CMK's activities at Mrima Hill. The "recommendations" section of the report is also relevant and material because it will	The State agrees to undertake reasonable searches for the requested Documents and will produce all responsive Documents that are in the State's custody, possession or control.	Noted. At this stage no order from the Tribunal is required.	As the request is withdrawn no order is required at this time.

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			<p>his assertion that "<i>Until a proper mapping of the area had been conducted it would be impossible for NMK to consider whether it would be appropriate for part of Mrima Hill to be degazetted</i>". Mr Farah further notes that the mapping of Mrima Hill was "<i>perhaps the most important issue to be addressed</i>" (RWS-1 Farah, para 25).</p> <p>The letter of 5 February 2013 notes that "<i>An archaeological assessment was carried out by a team from the National Museums of Kenya (NMK) and recommendations outlined (Exhibit R-009).</i>"</p>	<p>contextualise the letter of 5 February 2013 including Mr Farah's claims concerning the prioritisation of its content.</p>			

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d. Local Equity Participation							
31.	CI	All "show cause" notices issued by the Commissioner of Mines and Geology to companies holding mining licences or leases for alleged failure to satisfy the condition to have 35 per cent local equity participation in accordance with the <i>Mining (Local Equity Participation) Regulations 2012</i> (the Equity Participation Regulations).	As part of the State's Illegality Objection, the State alleges that CMK failed to meet the Equity Participation Regulations (State's Counter-Memorial, para 42 and Section A4 generally). The Equity Participation Regulations attempt to introduce an additional condition into every mining licence (CER-1 Torgbor, Answer to Question 6). The procedure for any failure to meet a condition of a mining licence provides the Commissioner of Mines and Geology with the power to issue the licence holder a show cause notice detailing the non-compliance and allowing the licence	<p>These Documents are relevant and material to the State's Illegality Objection (and its defence on the merits). They may also be relevant and material to the Claimants' FET and expropriation claims.</p> <p>For any failure to meet the Equity Participation Regulations to be of any consequence, the Commissioner of Mines and Geology must have, as an initial step, issued the relevant party with a show cause notice for any alleged failure to meet the requirements of the regulation. No such notice was ever issued to the Claimants. However, if such notices were issued to <i>other</i> parties, that will undermine the State's</p>	<p>The State objects to this request on the basis that:</p> <ul style="list-style-type: none"> i. the Documents are not sufficiently relevant or material to the outcome of the case; and ii. it is a fishing expedition. <p>The Documents sought, if any, would not establish the legality or otherwise of SML 351 as a matter of law and therefore they are not sufficiently relevant or material to the outcome of the case.</p>	<p>The Claimants do not accept the State's objections to this request.</p> <p>First, regarding the State's contention that "<i>the Documents are not sufficiently relevant or material to the outcome of the case</i>", the Claimants repeat their comments under DPR 13 above. The State seems to be trying to use the circumstantial nature of its illegality case to evade its document production obligations. If the State does not</p>	<p>The Tribunal recognizes that the issues underlying DPR 31 are:</p> <ol style="list-style-type: none"> 1. due process in terms of notice and an opportunity for CMK to respond; and 2. whether the 35% requirement was administered uniformly and fairly. <p>However DPR 31 is framed too broadly. In an attempt to reduce DPR 31 to more manageable proportions, the Respondent is directed to provide Claimants with:</p>

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			holder an opportunity to show cause.	reliance on the Equity Participation Regulations in this case and suggest that the State treated other mining companies differently to the way it treated CMK (which would support the Claimants' case on discrimination).	<p>The Claimants' assertion that such Documents "<i>may also be relevant and material to the Claimants' FET and expropriation claims</i>" (emphasis added) is insufficiently particularised and purely speculative.</p> <p>Furthermore, this request is no more than a fishing expedition designed by the Claimants to obtain material to support a case on discrimination in relation to the implementation of the Equity Participation Regulations, which case the Claimants have not pleaded and</p>	<p>consider that the Equity Participation Regulations are material to the outcome of the case, it should formally withdraw all allegations it makes in respect of the Equity Participation Regulations. Otherwise, the State should have to produce the documents requested.</p> <p>Second, it seems that the State does not understand its own case on the Equity Participation Regulations. The State has relied upon the Claimants'</p>	<ol style="list-style-type: none"> documentation of practice or protocols setting out the procedure for enforcement of the 35% requirement in force between 2012 and the registration date of 7 June 2015; a list of the mining companies to whom show cause summons were issued between the making of the Equity Participation Regulation and revocation of CMK's licence on 5 August 2013; a list of companies holding mining licenses whose licenses were cancelled for alleged failure to satisfy the

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					for which there is no basis.	alleged failure to satisfy the Equity Participation Regulations as part of the State's Illegality Objection and its defence on the merits. The Equity Participation Regulations impose a condition into applicable mining licences or leases. As Justice Torgbor explains in his expert report, any alleged failure by CMK to comply with the Equity Participation Regulations is to be dealt with the same way that a failure to comply with any other condition of a mining licence or lease would be: by	condition to have 35% local equity participation between the making of the Regulation in 2012 to registration of this arbitration on 7 June 2015; Once production of these documents (if any) is made, the Claimants may make application for additional productions if so advised. DPR 31 is GRANTED in part

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						<p>issuing a "<i>show cause</i>" notice (see Torgbor CER-1, Answer to Question 6; see also Claimants' Counter-Memorial, para 113).</p> <p>It is common ground that CMK was never issued such a "<i>show cause</i>" notice. The point of this DPR is to get the documents necessary to determine whether any <i>other</i> mining companies were issued with "show cause" notices in respect of the Equity Participation Regulations. If they were, then that will</p>	

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						<p>support the Claimants' position (and Justice Torgbor's view) that such a notice was required. Obviously, it will also suggest that the State discriminated against CMK in this area, denying it the benefit of an opportunity to "show cause" whilst granting that benefit to other mining companies.</p> <p>As to the State's contention that the Claimants have not pleaded their case on discrimination in relation to the implementation of the Equity Participation</p>	

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No.	Req. Party	Documents or Category of Documents Requested By Claimants	Relevance and Materiality According to Requesting Party		Responses/ Objections to Document Request	Reply to Objections to Document Requests	Tribunal's Decision
			Reference to Submissions	Comments			
						<p>Regulations, indeed they have not. The issue of non-compliance with the Equity Participation Regulations was only raised by the State in its Counter-Memorial. Discrimination is obviously a merits issue and will be addressed as such in the Claimants' Reply on the Merits, which is due to be filed on 21 July 2017. Having cast its illegality case so broadly, the State cannot rely on the fact the Claimants' Reply on the Merits has not yet been filed to resist producing the</p>	

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No.	Req. Party	Documents or Category of Documents Requested By Claimants	Relevance and Materiality According to Requesting Party		Responses/ Objections to Document Request	Reply to Objections to Document Requests	Tribunal's Decision
			Reference to Submissions	Comments			
						requested Documents. Such an approach would defeat the purpose of document production and the Tribunal's scheduling orders.	
32.	CI	Documents (other than "show cause" notices) in the possession, custody or control of the Relevant Government Agencies reflecting or recording the State's implementation of the Equity Participation Regulations including (without limitation) communications between the Relevant Government Agencies and third parties subject to the Equity Participation Regulations.	The Claimants' case is that the Equity Participation Regulations did not require immediate compliance and that the Claimants were entitled to due process, including the opportunity to respond to a "show cause" notice before any enforcement action could have been taken by the State (Claimants' Counter-Memorial on Preliminary Objections, paras 111-113; CER1-Torgbor, Answer to	For reasons explained under DPR 31 above, the requested Documents are relevant and material to the State's Illegality Objection (and its related merits defences) and the Claimants' expropriation and FET claims. Specifically, these documents will provide evidence as to (i) the timescale for compliance with the Equity Participation Regulations, (ii) the process for enforcement of the Equity Participation Regulations, (iii) the question of whether	The State objects to this request on the same grounds as set out in response to the Claimants' DPR 31 above. The State further objects to this request on the basis that the request is unreasonably broad. The Equity Participation Regulations have been implemented across all Government departments, and	The Claimants do not accept the State's objections to this request. The Claimants' repeat their reply to DPR 31 above. Additionally, this DPR is not unreasonably broad. The Equity Participation Regulations apply to mining licences. In arguing unreasonable burden and	This request lacks materiality, is far too broad and burdensome. DPR 32 is REJECTED.

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No.	Req. Party	Documents or Category of Documents Requested By Claimants	Relevance and Materiality According to Requesting Party		Responses/ Objections to Document Request	Reply to Objections to Document Requests	Tribunal's Decision
			Reference to Submissions	Comments			
			<p>Question 6).</p> <p>As part of the State's Illegality Objection, the State alleges that the Claimants failed to comply with the Equity Participation Regulations (State's Counter-Memorial, Section A4).</p>	<p>CMK can be said not to have complied with the Equity Participation Regulations and (iv) the appropriate sanctions for non-compliance with the Equity Participation Regulations.</p>	<p>undertaking searches across all of these departments would be highly disproportionate and burdensome, and any responsive Documents would not be material to the outcome of the case.</p>	<p>disproportionality, the State seems to be suggesting that many different Government departments were involved in the Equity Participation Regulations. It is hard to see how this could be so, given the specific nature of the regulations in question. The Tribunal should not credit the State's objection in this regard. These documents should be produced or the State should formally withdraw all allegations it makes regarding the Equity Participation</p>	

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No.	Req. Party	Documents or Category of Documents Requested By Claimants	Relevance and Materiality According to Requesting Party		Responses/ Objections to Document Request	Reply to Objections to Document Requests	Tribunal's Decision
			Reference to Submissions	Comments			
						Regulations.	
e. Degazettement							
33.	CI	Documents recording consents granted by Relevant Government Agencies to other companies holding (or applying for) <i>prospecting or mining licences</i> over areas located within <i>forest reserves</i> during the Relevant Period.	The State alleges that CMK did not have the necessary consents to mine in a forest reserve (State's Counter-Memorial, para 402).	The State dismisses the Claimants' efforts to obtain consent to mine in a forest reserve, including exemptions granted by the Minister (Exhibit C-218). In light of this, the State's policy on mining in similar areas is relevant and material to the State's allegation. Further, if these Documents show that the State treated CMK differently to the way it treated other mining companies, that will be relevant and material to the Claimants' allegations of discrimination.	The State objects to this request on the basis that: i. the scope of the document request is unreasonably broad; ii. the Documents requested are not sufficiently relevant or material to the outcome of the case; and iii. it is a fishing expedition by the Claimants. The State does not agree with the	The Claimants do not accept the State's objections. First, regarding the State's contention that " <i>the Documents requested are not sufficiently relevant or material to the outcome of the case</i> ", the Claimants repeat their comments under DPR 13 above. The State is trying to use the circumstantial nature of its illegality case to evade its document production obligations. If the	The Claimants are entitled to documents recording consents (if any) to other companies holding or applying for prospecting or mining licenses within forest reserves between January 1, 2011 and cancellation of CMK's licence on 5 August 2013. DPR 33 is GRANTED in part.

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No.	Req. Party	Documents or Category of Documents Requested By Claimants	Relevance and Materiality According to Requesting Party		Responses/ Objections to Document Request	Reply to Objections to Document Requests	Tribunal's Decision
			Reference to Submissions	Comments			
					<p>Claimants' reasoning that "<i>the State's policy on mining in similar areas is relevant and material</i>" or that Documents recording consents to companies holding (or applying for) prospecting or mining licences in different forest reserves outside of Mrima Hill are relevant to the Claimants' allegations of discrimination.</p> <p>In particular, the Claimants have made no allegations that any mining companies holding (or applying for) licences in different forest reserves have</p>	<p>State does not consider that the issue of whether CMK had the necessary consents to mine in a forest reserve is material to the outcome of the case, it should formally withdraw this part of its illegality case. Otherwise, the State should have to produce the documents requested.</p> <p>As to the State's contention that this DPR is a "<i>fishing expedition</i>", the Claimants disagree. The State has put its mining policy in issue, and this DPR goes to that point.</p>	

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			Reference to Submissions	Comments			
					<p>been treated differently to the Claimants. Accordingly, this document request is a fishing expedition designed to obtain material to support a case on discrimination, which the Claimants have not pleaded and for which there is no basis.</p>	<p>Further, the Claimants are surprised by the State's objection regarding breadth: this request could only be "unreasonably broad" if there are many responsive documents – meaning <i>many other consents</i> granted by Relevant Government Agencies to other companies holding (or applying for) prospecting or mining licences over areas located within forest reserves during the Relevant Period. If that is the case, then the spectre of discrimination</p>	

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						<p>looms large indeed.</p> <p>If the State positively confirms that mining has been allowed in many forest reserves and provide a list of such , the Claimants are willing to drop this DPR. Otherwise, the State must produce the requested Documents.</p> <p>As to the State's contention that the Claimants have not pleaded their case on discrimination, the Claimants repeat their reply on this issue under DPR 31 above. In any event, the</p>	

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No.	Req. Party	Documents or Category of Documents Requested By Claimants	Relevance and Materiality According to Requesting Party		Responses/ Objections to Document Request	Reply to Objections to Document Requests	Tribunal's Decision
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						discrimination point is obvious and made clear in the Claimants comments on this DPR.	
34.	CI	Documents recording consents granted by Relevant Government Agencies to other companies holding (or applying for) prospecting or mining licences over areas located within <i>nature reserves</i> during the Relevant Period.	The State alleges that CMK did not have the necessary consents to mine in a nature reserve (State's Counter-Memorial, para 402).	The State dismisses the Claimants' efforts to obtain consent to mine in a nature reserve. In light of this, the State's policy on mining in similar areas is relevant and material to the State's allegation. Further, if these documents show that the State treated CMK differently to the way it treated other mining companies, that will be relevant and material to the Claimants' allegations of discrimination.	The State objects to this request on the basis that: <ul style="list-style-type: none"> i. the scope of the document request is unreasonably broad; ii. the Documents requested are not sufficiently relevant or material to the outcome of the case; and iii. it is a fishing expedition by 	As to the State's contention that " <i>the Documents requested are not sufficiently relevant or material to the outcome of the case</i> ", the Claimants repeat their comments under DPR 13 above. The State is trying to use the circumstantial nature of its illegality case to evade its document production obligations. If the State does not consider that the	The same issues as in DPR 33 except with relation to areas located within nature reserves. The relevant documents in the same time period are to be produced as set out in DPR 33 <i>mutatis mutandis</i> . DPR 34 is GRANTED in part.

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			Reference to Submissions	Comments			
					<p>the Claimants.</p> <p>The State does not agree with the Claimants' reasoning that "<i>the State's policy on mining in similar areas is relevant and material</i>" or that Documents recording consents to companies holding (or applying for) prospecting or mining licences in different nature reserves outside of Mrima Hill are relevant to the Claimants' allegations of discrimination.</p> <p>In particular, the Claimants have made no allegations that any mining</p>	<p>issue of whether CMK had the necessary consents to mine in a nature reserve is material to the outcome of the case, it should formally withdraw this part of its illegality case. Otherwise, the State should have to produce the documents requested.</p> <p>As to the State's contention that the Claimants cannot request these documents because the Claimants have not pleaded their case on discrimination, the Claimants repeat their reply on this issue under DPR</p>	

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No.	Req. Party	Documents or Category of Documents Requested By Claimants	Relevance and Materiality According to Requesting Party		Responses/ Objections to Document Request	Reply to Objections to Document Requests	Tribunal's Decision
			Reference to Submissions	Comments			
					<p>companies holding (or applying for) licences in different nature reserves have been treated differently to the Claimants. Accordingly, this document request is a fishing expedition designed to obtain material to support a case on discrimination, which the Claimants have not pleaded and for which there is no basis.</p>	<p>31 above. In any event, the discrimination point is obvious and made clear in the Claimants comments on this DPR.</p> <p>The request is not broad, unless the State agrees with the Claimants that the State's policy has been to allow mining in many nature reserves.</p> <p>Accordingly, the Claimants request the State to positively confirm that mining has been allowed in many nature reserves, or produce the requested</p>	

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No.	Req. Party	Documents or Category of Documents Requested By Claimants	Relevance and Materiality According to Requesting Party		Responses/ Objections to Document Request	Reply to Objections to Document Requests	Tribunal's Decision
			Reference to Submissions	Comments			
						Documents.	
35.	Cl	Documents within the custody, possession or control of the Relevant Government Agencies recording consents granted by Relevant Government Agencies during the Relevant Period to other companies holding (or applying for) prospecting or mining licences over areas zoned as a <i>national monument</i> .	The State alleges that CMK did not have the necessary consents to mine in an area which was a national monument (State's Counter-Memorial, para 402).	The State dismisses the Claimants' efforts to obtain consent to mine in an area zoned as a national monument. In light of this, the State's policy on mining in similar areas is relevant and material to the State's allegation. Further, if these Documents show that the State treated CMK differently to the way it treated other mining companies, that will be relevant and material to the Claimants' allegations of discrimination.	The State objects to this request on the basis that: i. the scope of the document request is unreasonably broad; ii. the Documents requested are not sufficiently relevant or material to the outcome of the case; and iii. it is a fishing expedition by the Claimants. The State does not agree with the Claimants' reasoning that " <i>the State's</i>	As to the State's contention that " <i>the Documents requested are not sufficiently relevant or material to the outcome of the case</i> ", the Claimants repeat their comments under DPR 13 above. The State seems to be trying to use the circumstantial nature of its illegality case to evade its document production obligations. If the State does not consider that the issue of whether CMK had the necessary consents to mine in an area	Similar to DPR 33, except with respect to companies holding or applying for prospecting or mining licenses over areas zoned as <i>national monument</i> . Same disposition for the same time period as DPR 33 and DPR 34 <i>mutatis mutandis</i> . DPR 34 is GRANTED in part.

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No.	Req. Party	Documents or Category of Documents Requested By Claimants	Relevance and Materiality According to Requesting Party		Responses/ Objections to Document Request	Reply to Objections to Document Requests	Tribunal's Decision
			Reference to Submissions	Comments			
					<p><i>policy on mining in similar areas is relevant and material"</i> or that Documents recording consents to companies holding (or applying for) prospecting or mining licences in different areas zoned as a national monument outside of Mrima Hill are relevant to the Claimants' allegations of discrimination.</p> <p>In particular, the Claimants have made no allegations that any mining companies holding (or applying for) licences in different areas zoned as a national monument</p>	<p>which was a national monument is material to the outcome of the case, it should formally withdraw this part of its illegality case. Otherwise, the State should have to produce the documents requested.</p> <p>As to the State's contention that the Claimants cannot request these documents because the Claimants have not pleaded their case on discrimination, the Claimants repeat their reply on this issue under DPR 31 above. In any event, the</p>	

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					<p>have been treated differently to the Claimants. Accordingly, this document request is a fishing expedition designed to obtain material to support a case on discrimination, which the Claimants have not pleaded and for which there is no basis.</p>	<p>discrimination point is obvious and made clear in the Claimants comments on this DPR.</p> <p>As to the State's objection that this DPR is unreasonably broad, that could only be true if many responsive documents exist - meaning <i>many other consents</i> granted by Relevant Government Agencies to other companies holding (or applying for) prospecting or mining licences over areas zoned as a national monument. If that</p>	

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						<p>is the case, discrimination is obviously an important issue.</p> <p>If the State positively confirms that mining has been allowed in many areas zoned as national monuments, the Claimants are willing to drop this DPR. Otherwise, the State must produce the requested Documents.</p>	
III. Allegations of fraud and corruption against Commissioner Masibo							
36.	CI	Documents within the custody, possession or control of the Relevant Government Agencies recording the content of the meeting between	The decision to issue SML 351 was made at a meeting at the office of the President and Cabinet Secretary on 6 March 2013 (Claimants'	The requested Documents are relevant and material to the Claimants' case and the State's defence (including the State's Illegality Objection and the State's	The State agrees to undertake reasonable searches for the requested Documents and will produce all responsive	Noted. At this stage no order from the Tribunal is required.	As the request is withdrawn no order will be made.

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No.	Req. Party	Documents or Category of Documents Requested By Claimants	Relevance and Materiality According to Requesting Party		Responses/ Objections to Document Request	Reply to Objections to Document Requests	Tribunal's Decision
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		David Anderson, Don O'Sullivan, Jacob Juma, Moses Masibo, Francis Kimemia, Ali Mohammed and Isiyah Kabira, at the office of the President and Cabinet Secretary on 6 March 2013.	Memorial of Claim, para 72). As part of the State's Corruption Objection, the State alleges that this meeting was part of the Claimants' involvement in corrupt conduct (State's Counter-Memorial, paras 269-270).	Corruption Objection) because the parties disagree as to what was said and done by participants at the meeting of 6 March 2013.	Documents that are in the State's custody, possession or control.		
37.	CI	Documents within the custody, possession or control of the Relevant Government Agencies recording or reflecting communications or meetings between Moses Masibo and Jacob Juma between 1 September 2012 and 7 March 2013.	As part of the State's Corruption Objection, the State alleges that the Commissioner of Mines and Geology, Moses Masibo, and Jacob Juma, were part of a conspiracy to defraud CMK of its interest in Mrima Hill (State's Counter-Memorial, paras 121.4, 277). In support of its allegations, the State relies on the witness evidence of Mr Ndung'u	The requested Documents are relevant and material to the State's Corruption Objection because they will show the extent to which the relationship between Commissioner and Masibo and Mr Juma was corrupt, and if so, to what extent such corruption related to the Claimants (if at all).	The State agrees to undertake reasonable searches for the requested Documents and will produce all responsive Documents that are in the State's custody, possession or control.	Noted. At this stage no order from the Tribunal is required.	As the request is withdrawn no order will be made.

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			that Mr Juma and Commissioner Masibo conspired together regarding CMK's rights over Mrima Hill (RWS-1 Ndung'u, paras 24-30).				
38.	CI	The complete file of Documents from investigations into Moses Masibo following his suspension from office, including (without limitation) investigations by the Public Service Commission, the National Police Service and the Directorate of Criminal Investigations and the instructions and terms of reference pursuant to which each investigation has been/is being undertaken.	As part of the State's Illegality Objection and the State's Corruption Objection, the State's case depends significantly on the allegation that Commissioner Masibo engaged in <i>ultra vires</i> and corrupt conduct (see, <i>inter alia</i> , State's Counter-Memorial, paras 16, 122, 151, 272). In support of this element of its case, the State relies on the fact that Commissioner Masibo was investigated	The requested Documents are relevant and material to the State's Illegality Objection and the State's Corruption Objection because they are directly relevant to the question of whether an irregular or corrupt process was followed by Commissioner Masibo in granting SML 351.	The State agrees to undertake reasonable searches for the requested Documents and will produce all responsive Documents that are in the State's custody, possession or control. The Public Service Commission, the National Police Service and Directorate of Criminal Investigations ⁷ are	The Claimants are concerned by the State's response to this DPR. The State is suggesting that it may not be able to produce the requested documents due to internal constitutional barriers. Such barriers (if they exist at local law) are irrelevant. The Republic of Kenya	The Tribunal notes that the Respondent has agreed to undertake "reasonable searches for the requested documents and will produce all responsive documents [regarding allegations of <i>ultra vires</i> and corrupt conduct against Commissioner Masibo] that are in the State's custody, possession or

⁷ The Public Service Commission and the National Police Service Commission are created and provided for under Article 248 of the Constitution. Further, the National Police Service (of which the Directorate of Criminal Investigations is part) was established under Article 243 of the Constitution.

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			<p>after he was suspended from office (State's Counter-Memorial, para 151). In support of this submission the State has produced an inquiry report dated 18 January 2016 (Exhibit R-115). The report notes (on p 4) that "<i>Several witnesses were interviewed and recorded their statements concerning this inquiry. Several documents have been collected during investigations and there is sufficient evidence in this case against the suspended commissioner of mines Mr MOSES MASIBO</i>".</p>		<p>independent agencies,⁸ and are not under the direction or control of the Government. Accordingly, it is not in the State's power to compel those agencies to produce any responsive Documents.</p>	<p>participates in this arbitration as a single entity. Any Documents within such agencies are within the custody, possession or control of the Republic of Kenya. The State plainly cannot use its own internal constitutional arrangements to evade an obligation to produce documents that arises under international law. To allow the State to gain a forensic advantage from its own internal law would not only offend basic</p>	<p>control".</p> <p>The Tribunal recognizes however that:</p> <ol style="list-style-type: none"> 1. the "complete file" is likely to be in the custody of the police or other investigative authorities; 2. as noted previously, the Tribunal does not accept that the Respondent's internal arrangements for the independence of the Public Service Commission, the National Police Service and the

⁸ Article 249(2) of the Constitution.

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						<p>principles of international law, but it would also be manifestly unfair to the Claimants.</p> <p>The Claimants expect the State to produce all documents responsive to this DPR and reserve their rights, including their right to invite the Tribunal to draw adverse inferences if the State tries to justify non-production on the basis of its own internal constitutional arrangements.</p>	<p>Director of Criminal Investigations preclude production of relevant documents in an international arbitration.</p> <p>3. The Tribunal on the other hand considers it excessively wide and burdensome to require disclosure of complete police or investigative files;</p> <p>4. Accordingly, the Respondent is directed to produce records that provide a summary of the results of the investigation; and</p> <p>5. Once the Respondent has made such</p>

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							disclosure, the Claimants may apply for additional documents if so advised. DPR 38 is GRANTED in part.
39.	CI	Documents recording or reflecting the Director of Public Prosecutions' consideration of whether to prosecute Moses Masibo, including consideration of the Directorate of Criminal Investigations' recommendation that Moses Masibo be charged.	As part of the State's Illegality Objection and the State's Corruption Objection, the State relies on the recommendation to the Director of Public Prosecutions to prosecute Commissioner Masibo as part of its case that SML 351 was granted improperly (State's Counter-Memorial, para 151). However, there is no	Given that the State relies on the recommendation to the Director of Public Prosecutions, but Commissioner Masibo does not appear to have been charged by the Director of Public Prosecutions, the requested Documents are relevant and material to the State's Corruption Objection.	The State agrees to undertake reasonable searches for the requested Documents and will produce all responsive Documents that are in the State's custody, possession or control. The Director of Public Prosecutions and the Directorate	The Claimants are concerned by the State's response to this DPR. The State's internal constitutional arrangements are irrelevant to its international obligation to produce. The Claimants repeat their reply under DPR 39 above and similarly reserve	DPR 39 is excessively broad and represents a disproportionate intrusion into an area of prosecutorial discretion beyond the needs of this arbitration. It will be sufficient for the Respondent to disclose any reasons provided publicly by the Director of Public Prosecutions

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			evidence that Commissioner Masibo has ever been convicted or otherwise found culpable of any corruption-related offence (Claimants' Counter-Memorial on Preliminary Objections, para 239).		of Criminal Investigations ⁹ are independent agencies, ¹⁰ and are not under the direction or control of the Government. Accordingly, it is not in the State's power to compel those agencies to produce any responsive Documents.	their rights.	for the decision to prosecute Moses Masibo. DPR 39 is GRANTED in part.
IV. Unlawful revocation							
a. CS Balala request for bribe							
40.	CI	Documents recording or reflecting the content of any discussions or meetings between CS Balala and Jacob Juma	One of the motives behind the State's revocation of SML 351 is the Claimants' failure to pay CS Balala a bribe	The requested Documents are relevant to the Claimants' case: they will show the relationship between CS Balala and Mr	The State agrees to undertake reasonable searches for the requested Documents and will produce all	Noted. At this stage no order from the Tribunal is required.	As no order is requested at this time no order is made.

⁹ The Director of Public Prosecutions is established by Article 157 of the Constitution. Further, the National Police Service (of which the Directorate of Criminal Investigations is part) was established under Article 243 of the Constitution.

¹⁰ Article 249(2) of the Constitution.

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No.	Req. Party	Documents or Category of Documents Requested By Claimants	Relevance and Materiality According to Requesting Party		Responses/ Objections to Document Request	Reply to Objections to Document Requests	Tribunal's Decision
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		regarding Mrima Hill between the date of CS Balala's commencement as Cabinet Secretary of Mining and 5 August 2013.	he requested from Jacob Juma and David Anderson on 8 July 2013 (Claimants' Memorial of Claim, paras 91-93). In response, the State denies the Claimants' allegation that CS Balala requested a bribe and labels it an allegation " <i>without foundation</i> " (State's Counter-Memorial, para 150).	Juma. Further, they may contain material statements that would support or undermine the parties' respective positions on whether or not CS Balala requested a bribe.	responsive Documents that are in the State's custody, possession or control.		
41.	CI	Documents recording or reflecting any allegations of corrupt conduct or abuse of office made against CS Balala since he became a public official to the present.	One of the motives behind the State's revocation of SML 351 is the Claimants' failure to pay CS Balala a bribe he requested from Jacob Juma and David Anderson on 8 July 2013 (Claimants' Memorial of Claim, paras 91-93). In response, the State denies the Claimants'	The requested Documents are relevant to the Claimants' expropriation claim, as part of which the Claimants allege that the expropriation was motivated by their refusal to pay a bribe solicited by CS Balala. These Documents will show whether CS Balala's conduct in office has been the subject of similar allegations: if it has,	The State objects to this request on the basis that: <ul style="list-style-type: none"> i. the Documents requested are not sufficiently relevant or material to the outcome of the case; and ii. it is a fishing 	The Claimants do not accept the State's objections to this DPR. <p>First, the requested documents are relevant and material to the Claimants' FET claim (part of which is that CS Balala unlawfully</p>	Request 41 is far too broad. It is unlimited in terms of potential sources and excessive in terms of its stipulated time period. <p>DPR 41 is DISMISSED.</p>

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			<p>allegation that CS Balala requested a bribe and labels it an allegation "<i>without foundation</i>" (State's Counter-Memorial, para 150).</p> <p>The Claimants also claim that the solicitation of a bribe is a violation of FET (Claimants' Counter-Memorial on Preliminary Objections, para 203).</p>	<p>then that would support the Claimants' allegations.</p> <p>Further, these Documents are relevant and material to the Claimants' FET claim.</p>	<p>expedition by the Claimants.</p> <p>Any allegations against CS Balala that are not related to CMK or CMK's alleged prospecting and/or mining rights are not sufficiently material to the outcome of these proceedings. The State has agreed to undertake reasonable searches for responsive Documents to the Claimants' DPR 42, and contends that any further Documents responsive to this DPR 41 will not be determinative of whether CS Balala requested a bribe from Jacob Juma and</p>	<p>solicited a bribe from the Claimants). They are also relevant to the Claimants' expropriation claim, as part of which the Claimants contend that SML 351 was revoked by CS Balala as the Claimants failed to pay the bribe he solicited. So these documents go to the State's liability.</p> <p>Second, the Claimants dispute the State's contention that "<i>allegations against CS Balala that are not related to CMK or CMK's alleged prospecting and/or mining</i></p>	

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					<p>David Anderson, as alleged by the Claimants.</p> <p>Further, this request is a fishing expedition by the Claimants, as the Claimants have not pleaded that any other allegations of corrupt conduct or abuse of office have been made against CS Balala.</p> <p>This fishing expedition is an attempt by the Claimants to obtain material to support their FET claim, without any relevant foundation.</p>	<p><i>rights are not sufficiently material to the outcome of these proceedings".</i></p> <p>While it is correct that the Claimants' claims regarding CS Balala's conduct focus on CMK and SML 351, CS Balala's wider conduct is obviously relevant to this issue. If there are documents that record other allegations of corrupt conduct or abuse of office by CS Balala, then those documents will be relevant and material as they will corroborate the Claimants' specific allegations</p>	

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						<p>regarding his conduct vis-a-vis CMK and SML.</p> <p>As to the State's suggestion that its production under DPR 42 will satisfy this DPR, the Claimants disagree. The documents sought in DPR 42 are specific to Mr Anderson's complaint against CS Balala.</p>	
42.	CI	Documents recording or reflecting investigations and other action taken by the Ethics and Anti-Corruption Committee following David Anderson's complaint against CS Balala, including documents that record or reflect interactions between the	One of the motives behind the State's revocation of SML 351 is the Claimants' failure to pay CS Balala a bribe he requested from Jacob Juma and David Anderson on 8 July 2013 (Claimants' Memorial of Claim, paras 91-93). In	The requested Documents are relevant to the Claimants' expropriation claim, as part of which the Claimants allege that the expropriation was motivated by their refusal to pay a bribe solicited by CS Balala. These Documents will show the extent to which the State investigated	The State agrees to undertake reasonable searches for the requested Documents and will produce all responsive Documents that are in the State's custody, possession or control.	The Claimants are concerned by the State's response to this DPR. The State's internal constitutional arrangements are irrelevant to its international obligation to produce. The	The Tribunal notes that DPR 42 is limited to the complaint of David Anderson against CS Bala. The Tribunal also notes the undertaking of the Respondent as set out in Column 5 herein and directs the

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		Ethics and Anti-Corruption Committee and the Director of Public Prosecutions regarding David Anderson's complaint against CS Balala.	<p>response, the State denies the Claimants' allegation that CS Balala requested a bribe and labels it an allegation "<i>without foundation</i>" (State's Counter-Memorial, para 150).</p> <p>The Claimants also claim that the solicitation of a bribe is a violation of FET (Claimants' Counter-Memorial on Preliminary Objections para 203).</p> <p>After CS Balala's request for a bribe from CMK, David Anderson reported the incident to the Ethics and Anti-</p>	<p>Mr Anderson's complaint and the results of any such investigation.</p> <p>Further, these Documents are relevant and material to the Claimants' FET claim including because any failure by the State to properly investigate Mr Anderson's complaint will be evidence of the State's unreasonable, discriminatory and unfair treatment of the Claimants.</p>	The Ethics and Anti-Corruption Committee and the Director of Public Prosecutions ¹¹ are independent agencies, and are not under the direction or control of the Government. ¹² Accordingly, it is not in the State's power to compel those agencies to produce any responsive Documents.	Claimants repeat their reply to DPR 39 above and similarly reserve their rights.	<p>Respondent to expand the undertaking to include documents in the possession of the Ethics and Anti-Corruption Committee and the Director of Public Prosecutions.</p> <p>As noted above, the Tribunal does not accept the Respondents internal arrangements (which are perfectly understandable in a domestic context) to immunize documents from production in an international</p>

¹¹ The Office of the Director of Public Prosecutions is established by Article 157 of the Constitution, while the Ethics and Anti-Corruption Commission is provided for under Article 79 of the Constitution.

¹²Article 249(2) of the Constitution.

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			Corruption Committee (Claimants' Memorial of Claim, para 93).				arbitration. DPR 42 is GRANTED.
b. Revocation of SML 351 by CS Balala							
43.	CI	Letter from CS Balala to the Attorney-General dated 17 July 2013 seeking the opinion of the Attorney-General's office on the validity of mining licences issued between 5 March 2013 and 14 May 2013.	On 5 August 2013, CS Balala received a letter from the Attorney-General of Kenya advising him that he could, if certain conditions were satisfied, revoke mining licences issued between 5 March 2013 and 14 May 2013, and the procedures to be followed. The Attorney-General's 5 August 2013 letter to CS Balala refers to a letter received from CS Balala on 17 July 2013 (Exhibit C-149), and this has not been provided.	This document is relevant and material to the Claimants' expropriation claim. In opposing the Claimants' expropriation claim that SML 351 was revoked, the State has put CS Balala's subjective intent and state of mind in issue: the State says that CS Balala actually meant "suspended". However, the State does not provide any witness statement from CS Balala to substantiate the assertions it makes about his intent and state of mind. CS Balala's letter to the Attorney-General is relevant and material to whether he was looking to	The State agrees to undertake reasonable searches for the requested Document and will produce any such responsive Document that is in the State's custody, possession or control. The State, however, does not waive privilege that it may hold over any other Documents or classes of Documents by virtue of the agreement to search for and, if applicable, produce	Noted. However, the State has waived privilege in respect of all matters and Documents as to the advice CS Balala received from the Attorney-General on 5 August 2013, including instructions and the 17 July 2013 letter requested. Privilege is, therefore, not a basis upon which the State can rely to resist or limit its production under	The question whether SML 351 was revoked or just suspended is a live issue between the parties and the Respondent is required to produce the letter from CS Balala to the Attorney General dated 17 July 2013. The Tribunal notes that in producing this document, the Respondent is not to be taken as waiving privilege that "it may hold over any other documents or classes of documents". The

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No.	Req. Party	Documents or Category of Documents Requested By Claimants	Relevance and Materiality According to Requesting Party		Responses/ Objections to Document Request	Reply to Objections to Document Requests	Tribunal's Decision
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				<p><i>revoke</i> SML 351 (as he announced) or <i>suspend</i> SML 351 (as the State now argues).</p> <p>This document is also relevant to the Claimants' FET claim, including because its content will reveal (i) the extent to which CS Balala was aware of the statutory process for revoking a mining licence (which is relevant to the Claimants' claim that he acted in an arbitrary and unreasonable manner) and (ii) the extent to which CS Balala was focused on CMK's mining licence (which is relevant to the Claimants' claim that he discriminated against them when he revoked SML 351).</p>	the requested Document.	<p>this DPR.</p> <p>Without prejudice to the Claimants' position that privilege has been waived, if the State refuses to produce any responsive Documents on the basis of privilege the Claimants request that the State be required to prepare a privilege log of such Documents and for the Tribunal to determine whether the State's claims to privilege are founded.</p>	<p>Tribunal will determine the issue of waiver if and when it properly arises for decision. In the event documents are withheld from production on the basis of privilege, the Tribunal agrees with the Claimants that a privilege log should be prepared for the consideration of the Tribunal.</p> <p>DPR 43 is GRANTED.</p>
44.	CI	Documents created between 17 July 2013 and	On 5 August 2013, CS Balala held a press	The requested Documents are relevant and material to	The State agrees to undertake reasonable	Noted. At this stage no order from the	As this request is not pursued at this stage

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No.	Req. Party	Documents or Category of Documents Requested By Claimants	Relevance and Materiality According to Requesting Party		Responses/ Objections to Document Request	Reply to Objections to Document Requests	Tribunal's Decision
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		5 August 2013 by CS Balala or his subordinates that contain any combination of the words "suspend", "suspends", "suspension", or "suspended" and the words "Cortec", "Cortec Mining", "Cortec Mining Kenya", "Cortec Mining Kenya Ltd", "SML 351", "Special Mining Licence 351" or "Mrima Hill".	conference at which he said that certain mining licences, including SML 351, were "revoked". This is admitted by the State. The State, however, argues that what CS Balala meant was that the licences were "suspended" (State's Counter-Memorial, para 149).	the Claimants' expropriation claim. In opposing the Claimants' claim that SML 351 was revoked, the State has put CS Balala's subjective intent and state of mind in issue: the State says that he actually meant "suspended". However, the State does not provide any witness statement from CS Balala to substantiate the assertions it makes about his intent and state of mind. These Documents are also relevant and material to the State's Illegality Objection, as part of which the State contends that SML 351 was void <i>ab initio</i> : if the licence never lawfully existed, there could have been nothing to lawfully suspend.	searches for the requested Documents and will produce all responsive Documents that are in the State's custody, possession or control.	Tribunal is required.	no order is made.
45.	CI	Documents recording or reflecting CS Balala's preparations for the press	On 5 August 2013, CS Balala held a press conference at which he	Documents from CS Balala's 5 August 2013 announcement that certain	The State agrees to undertake reasonable searches for the	Noted. At this stage no order from the Tribunal is	As this request is withdrawn at this stage no order is

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No.	Req. Party	Documents or Category of Documents Requested By Claimants	Relevance and Materiality According to Requesting Party		Responses/ Objections to Document Request	Reply to Objections to Document Requests	Tribunal's Decision
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		conference he held on 5 August 2013, including (without limitation) any internal Documents from the Ministry of Mining in relation to the announcements he made at that press conference.	said that certain mining licences, including SML 351, were "revoked". This is admitted by the State. The State, however, argues that what CS Balala meant was that the licences were "suspended" (State's Counter-Memorial, para 149).	mining licences, including SML 351, were revoked are material and relevant to the State's argument that SML 351 was not revoked, but rather only suspended.	requested Documents and will produce all responsive Documents that are in the State's custody, possession or control.	required.	made.
46.	CI	Documents recording or reflecting Relevant Government Agencies or the Office of the Attorney General advising or informing CS Balala that he had the power to suspend SML 351.	The State argues that CS Balala did not revoke SML 351, but that he suspended the licence (State's Counter-Memorial, para 149).	CS Balala took advice on how he could revoke certain licences (Exhibit C-149). Any advice he took on whether he could suspend SML 351 is relevant and material to whether he in fact revoked or suspended SML 351, and also as to whether he afforded the Claimants due and proper process.	The State does not agree that the requested Documents would demonstrate whether CS Balala in fact revoked or suspended SML 351, or whether he afforded the Claimants due and proper process. Further, the State objects to the production of Documents recording	The State has waived privilege over the 5 August 2013 advice from the Attorney-General to CS Balala. The waiver is applicable to the issues on which the Attorney-General advised CS Balala, including CS Balala's powers with respect to a class of licences that included SML	The Tribunal notes the undertaking by the State to undertake "reasonable searches for any <i>non</i> -privileged response of documents". If the Respondent objects to the production of documents for which privilege is claimed the Tribunal agrees with the Claimants that the Respondent

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No.	Req. Party	Documents or Category of Documents Requested By Claimants	Relevance and Materiality According to Requesting Party		Responses/ Objections to Document Request	Reply to Objections to Document Requests	Tribunal's Decision
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					<p>or reflecting advice of the Office of the Attorney-General which are subject to legal privilege.</p> <p>Notwithstanding the above, the State agrees to undertake reasonable searches for any non-privileged responsive Documents and will produce all such Documents that are in the State's custody, possession or control.</p>	<p>351.</p> <p>Without prejudice to the Claimants' position that privilege has been waived, if the State refuses to produce any responsive Documents on the basis of privilege the Claimants request that the State be required to prepare a privilege log of such Documents and for the Tribunal to determine whether the State's claims to privilege are founded.</p>	<p>is to prepare a privilege log of such documents for the consideration of the Tribunal.</p>
c. Task Force							
47.	CI	Documents recording or reflecting instructions given to the Task Force by	The State alleges that it appointed an independent Task Force	The requested Documents are relevant and material to the State's defence on the	The State agrees to undertake reasonable searches for the	Noted. At this stage no order from the Tribunal is	As no order is requested none will

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No.	Req. Party	Documents or Category of Documents Requested By Claimants	Relevance and Materiality According to Requesting Party		Responses/ Objections to Document Request	Reply to Objections to Document Requests	Tribunal's Decision
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		Relevant Government Agencies from the date of the Task Force's inception to present.	to review all agreements and licences issued during the transition period or in " <i>irregular circumstances</i> " (State's Counter-Memorial, paras 7 and 149). However, the State's purpose was also to protect the State's national interest in the mining sector (State's Counter-Memorial, para 403) and the State said that it will undertake a " <i>comprehensive review of the mining policies in Kenya</i> " (State's Counter-Memorial, para 511).	merits, as part of which the State relies on the processes and conclusions of the Task Force. These Documents will show the purpose for establishing the Task Force, including whether it was intended and mandated to do what the State now says.	requested Documents and will produce all responsive Documents that are in the State's custody, possession or control.	required.	be made.
48.	CI	A complete copy of the file created and maintained by the Task Force concerning CMK's licences.	As part of the State's Illegality Objection and its defence to the Claimants' substantive claims, the State alleges that the Task Force was appointed to review all	These documents are relevant and material to the Claimants' expropriation claim. According to the State, the Task Force's mandate included policy review. The Claimants	The State agrees to undertake reasonable searches for the requested Documents and will produce all responsive Documents that are	Noted. At this stage no order from the Tribunal is required.	As no order is requested none will be made.

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No.	Req. Party	Documents or Category of Documents Requested By Claimants	Relevance and Materiality According to Requesting Party		Responses/ Objections to Document Request	Reply to Objections to Document Requests	Tribunal's Decision
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			agreements and licences issued during the transition period or in "irregular circumstances" (State's Counter-Memorial, para 7). According to the Gazette notice that established the Task Force (Exhibit R-017), the Task Force was broadly mandated with the aim of "streamlining the mining sector and in the context of comprehensive review of the mining policies in Kenya".	allege that SML 351 was revoked (unlawfully expropriated) as part of a policy to nationalise Mrima Hill. These documents will reveal the extent to which economic policy informed the Task Force's analysis and findings <i>vis-a-vis</i> SML 351.	in the State's custody, possession or control.		
49.		Documents (other than the file requested at DPR 48 above) created by or for the Task Force in the possession, custody or control of the Task Force or Relevant Government Agencies that contain any one of the following	As part of the State's Illegality Objection and its defence to the Claimants' substantive claims, the State alleges that the Task Force was appointed to review all agreements and licences issued during the	The requested Documents are relevant and material to the Claimants' expropriation and FET claims, as they will reveal the extent to which CMK (and its shareholders) were singled out by the Task Force or subjected to any specific	The State agrees to undertake reasonable searches for the requested Documents and will produce all responsive Documents that are in the State's custody, possession	Noted. At this stage no order from the Tribunal is required.	As no order is requested none will be made.

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No.	Req. Party	Documents or Category of Documents Requested By Claimants	Relevance and Materiality According to Requesting Party		Responses/ Objections to Document Request	Reply to Objections to Document Requests	Tribunal's Decision
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		words: (i) "Cortec"; (ii) "Cortec Mining"; (iii) "Cortec Mining Kenya"; (iv) "Cortec Mining Kenya Ltd"; (v) "SML 351"; (vi) "Special Mining Licence 351"; (vii) "Mrima Hill"; (viii) "Mrima"; (ix) "Pacific Wildcat"; or (x) "PAW".	transition period or in " <i>irregular circumstances</i> " (State's Counter-Memorial, paras 7 and 149). The State alleges that the Task Force undertook a transparent, non-arbitrary and consistent review process (State's Counter-Memorial, para 372).	policy analysis: if they were, then that will be relevant to the discrimination elements of the Claimants' expropriation and FET claims; it will also be relevant to the issue of motive, which the Claimants raise as an aggravating factor of the unlawful expropriation.	or control.		
d. Third party interests							

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			Reference to Submissions	Comments			
50.	CI	Documents within the custody, possession or control of the Relevant Government Agencies or other government departments responsible for international trade and investment that record or reflect interactions between the Ministry of Mining (or any other relevant State body) that record or reflect interactions between the Ministry of Mining (or other relevant State body) and representatives of the Government of the People's Republic of China (including any Chinese state-owned enterprises), from 9 April 2013 to the present.	The Claimants allege that their investments in Mrima Hill were expropriated as part of a nationalisation policy. The Claimants allege that part of the State's plan involved courting Chinese Government officials and Chinese state-owned enterprises to obtain technical support and investment in Mrima Hill (Claimants' Memorial of Claim, paras 119-120). In their Memorial of Claim, the Claimants pointed to a number of news reports and "tweets" of pictures showing meetings between " <i>Chinese mining investors</i> " and the Ministry of Mining (see Claimants' Memorial of Claim, para 119(a)). One of these	The requested Documents are relevant and material to the State's motive for revoking SML 351 and to the Claimants' allegations that the revocation of SML 351 was driven by resource nationalism. These Documents are also relevant and material to the State's merits defence.	The State objects to this request on the basis that: <ul style="list-style-type: none"> i. the Documents sought are not sufficiently relevant or material to the outcome of the case; ii. the request is unreasonably broad and unspecific; iii. the Documents are subject to commercial confidentiality; and iv. it is a fishing expedition. While the Claimants have made	The Claimants agree to narrow the request to responsive Documents that relate to Mrima Hill, Kwale County, niobium or rare earths. Such Documents are relevant to the State's motivation for revoking SML 351 and, hence, material to the case on liability. <p>Given the Claimants' agreement to narrow the request, the request is neither unreasonably broad nor unspecific.</p> The State's attempt to distance itself	The request is overly broad and unfocussed on the issues in dispute. <p>DPR 50 is REJECTED.</p>

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			meetings with " <i>Chinese mining investors</i> " took place two days after SML 351 was revoked (Claimants' Memorial of Claim, para 119(a)).		<p>unsubstantiated allegations that the State was "courting" Chinese Government officials and State-owned enterprises in relation to Mrima Hill, this document request is not confined to Mrima Hill. Accordingly, any responsive Documents may not have any relevance or materiality at all to the outcome of the case.</p> <p>Further, the State contends that the Claimants' request lacks any degree of specificity and is unreasonably broad as it requests <u>all</u> Documents that "<i>record or reflect interactions between</i></p>	<p>from the tweets by the Ministry of Mining is disingenuous. The tweets are not only contemporaneous with the revocation of SML 351, but also state: "<i>CS Balala meets Chinese mining investors</i>"; "<i>CS Balala now meeting with Chinese delegation of investors who are in the country for a 5 day visit #courtesycall</i>"; "<i>The Chinese team that met Hon Balala issues crucial to mining were discussed</i>".</p> <p>The Ministry of Mining and local newspapers</p>	

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					<p><i>the Ministry of Mining...and representatives of the Government of the People's Republic of China", which could result in many Documents being produced that are entirely unconnected to these proceedings.</i></p> <p>Further, any responsive Documents are subject to commercial confidentiality under the laws of Kenya.</p> <p>Finally, this is a fishing expedition by the Claimants. The Claimants have sought to allege a case of "resource nationalism" on the basis of "'tweets' of</p>	<p>announced soon after that the Kenyan Government had entered into an MOU with a Chinese SOE, (Claimants' Memorial of Claim, pp 54-56).</p> <p>Given the public announcements regarding the meetings and MOU, and the fact the discussions and agreement were made by a Ministry, which is subject to the usual checks and balances of any democratic government, the State's objections based on commercial</p>	

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					<p><i>pictures showing meetings between 'Chinese mining investors' and the Ministry of Mining", however these "tweets" make no reference whatsoever to Mrima Hill or the State's mining strategy, and therefore it is apparent that the Claimants are merely fishing for evidence to bolster an entirely unsubstantiated argument in their Memorial.</i></p>	<p>confidentiality have no substance.</p> <p>Further, the State's vague reference to "<i>commercial confidentiality under the laws of Kenya</i>" should be given no credit by the Tribunal.</p> <p>The Claimants request the State produce all Documents within the narrowed scope agreed by the Claimants above.</p>	
51.	CI	Documents within the custody, possession or control of the Relevant Government Agencies or other government departments responsible for international trade and investment that record or	The Claimants allege that their investments in Mrima Hill were expropriated as part of a nationalisation policy. The Claimants allege that part of the State's plan involved courting	The requested Documents are relevant and material to the State's motive for revoking SML 351 and to the Claimants' allegations that the revocation of SML 351 was driven by resource nationalism. These	The State objects to this request on the same grounds as set out in response to the Claimants' DPR 50 above.	The Claimants do not accept the State's objections to this DPR.	DPR 51 is overly broad and burdensome, in the absence of any evidence of a link connecting the meeting of CS Balala and Blue Ocean
					In addition, the	The request is not broad or unspecific. Indeed,	

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No.	Req. Party	Documents or Category of Documents Requested By Claimants	Relevance and Materiality According to Requesting Party		Responses/ Objections to Document Request	Reply to Objections to Document Requests	Tribunal's Decision
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		reflect interactions between the Ministry of Mining (or any other relevant State body) and representatives of the Blue Ocean Investment Fund between 9 April 2013 and the present.	Chinese Government officials and Chinese state-owned enterprises to obtain technical support and investment in Mrima Hill (Claimants' Memorial of Claim, para 119-120). In their Memorial of Claim, the Claimants referred to a news report that CS Balala had met with a " <i>delegation from China under the umbrella of the Blue Ocean Investment Fund</i> " (Claimants' Memorial of Claim, para 119(b), Exhibit C-160).	Documents are also relevant and material to the State's merits defence.	Claimants are relying on one news article that reported that CS Balala met Blue Ocean Investment Fund to discuss issues of " <i>Kenya's geological conditions and mining developments</i> ", but which makes no reference to Mrima Hill. The Claimants have failed to establish any link between this press article exhibited, Mrima Hill and their allegations of "resource nationalism", and this request is a fishing expedition.	it is very specific in terms of person and time period. As with the Claimants' response to DPR 50, the requested Documents are relevant to the motive for the State's revocation of SML 351 and material to the outcome of the case from the perspective of liability. Accordingly, the Claimants maintain this DPR in full.	Investment Fund to the Mrima Hill investment, the documents are not material. DPR 51 is REJECTED. .
52.	CI	The Memorandum of Understanding signed by CS Balala and the President of the	The Claimants allege that their investments in Mrima Hill were expropriated as part of a	The requested Documents are relevant and material to the State's motivations for revoking SML 351 and to	The State objects to this request on the basis that:	The Claimants do not accept the State's objections	The requested Memorandum of Understanding relates to the

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No.	Req. Party	Documents or Category of Documents Requested By Claimants	Relevance and Materiality According to Requesting Party		Responses/ Objections to Document Request	Reply to Objections to Document Requests	Tribunal's Decision
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		Geological Exploration Technology Institute of Jiangsu Province in China.	nationalisation policy. The Claimants allege that part of the State's plan involved courting Chinese Government officials and Chinese state-owned enterprises to obtain technical support and investment in Mrima Hill (Claimants' Memorial of Claim, para 119-120). In their Memorial of Claim, the Claimants pointed to a number of news reports and "tweets" by the Ministry of Mining (see Claimants' Memorial of Claim, para 119(a)). The Claimants also referred to a news report that CS Balala had signed a Memorandum of Understanding with the President of the Geological Exploration Technology Institute of	the Claimants' allegations that the revocation of SML 351 was driven by resource nationalism. These Documents are also relevant and material to the State's merits defence.	<p>i. the Document sought is not sufficiently relevant or material to the outcome of the case;</p> <p>ii. the Document is subject to commercial confidentiality; and</p> <p>iii. it is a fishing expedition.</p> <p>While the Claimants have made unsubstantiated allegations of "resource nationalism" against the State in connection with their alleged investment in Mrima Hill, this document request is</p>	<p>to this DPR.</p> <p>The State's attempt to downplay the requested Documents as relating to an allegation based on one tweet and a newspaper article is disingenuous and ignores the surrounding circumstances including the contemporaneous revocation of SML 351 and reference being made to the requested Document giving China "<i>an upper hand in future bidding for exploration and mining contracts</i>" (Claimants' Memorial of</p>	<p>mapping of areas across Kenya. DPR 52 is rejected except insofar as the Memorandum of Understanding signed between CS Balala and the Chinese Institute refers explicitly to the Mrima Hill area. If such extracts are produced, the Claimants are to give the necessary undertakings as to confidentiality.</p> <p>DPR 52 is GRANTED in part.</p>

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			Jiangsu Province in China (Claimants' Memorial of Claim, para 119(d), Exhibit C-161).		<p>not confined to Mrima Hill. Even on the Claimants' case, the Memorandum of Understanding related to mapping out areas across the whole of Kenya that have "<i>signs of mineral deposits</i>" (Claimants' Memorial, para. 119(d)). Accordingly, any responsive Documents may not have any relevance or materiality at all to the outcome of the case.</p> <p>Further, any such Documents are subject to commercial confidentiality under the laws of Kenya.</p>	<p>Claim, para 119(d); Exhibit C-161.</p> <p>The requested Document is relevant to the State's motivation for the revocation of SML 351 (including resource nationalism).</p> <p>The State's vague reference to "<i>commercial confidentiality under the laws of Kenya</i>" should be given no credit by the Tribunal. In any event, if confidentiality is a genuine concern, the Claimants are willing to give the necessary undertakings.</p>	

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No.	Req. Party	Documents or Category of Documents Requested By Claimants	Relevance and Materiality According to Requesting Party		Responses/ Objections to Document Request	Reply to Objections to Document Requests	Tribunal's Decision
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					<p>Finally, this is a fishing expedition by the Claimants. The Claimants have sought to allege a case of "resource nationalism" in connection with their investment in Mrima Hill on the basis of one tweet from the Ministry of Mining (Claimants' Memorial, para. 119(c)) and a newspaper article in the Business Daily (Exhibit C-161).</p> <p>However, this tweet and newspaper article make no reference whatsoever to Mrima Hill or the State's mining strategy. In addition, even on the Claimants' case, the</p>	<p>The Claimants note also that it is hypocritical for the State to criticise the Claimants for relying on a newspaper article. The State relied on newspaper articles in its Counter-Memorial (see, for example, para 119 of the State's Counter-Memorial).</p> <p>The Claimants maintain this DPR in full.</p>	

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					MOU was in relation to " <i>remote sensing, airborne geophysical survey and upgrading of geological services</i> " nationwide and was not confined to Mrima Hill (Claimants' Memorial, para. 119(c)). Therefore it is apparent that the Claimants are merely fishing for evidence to bolster an entirely unsubstantiated argument in their Memorial.		
53.	CI	Documents that record or reflect State officials giving consideration to or discussing the grant of prospecting rights or prospecting/mining licences or leases over Mrima Hill to third parties	The Claimants allege that the expropriation of its investments (and breach of FET) were motivated by resource nationalism (Claimants' Memorial of Claim,	The requested Documents are relevant and material to the State's motivations for revoking SML 351 and to the Claimants' allegations that the revocation of SML 351 was driven by resource nationalism. These	The State objects to this request on the basis that: i. the request is unreasonably broad and	The Claimants do not accept that this DPR is " <i>unreasonably broad</i> " or " <i>unspecific</i> ". The granting of mineral rights to third	The request for documents reflecting "State officials... giving consideration to or discussing the grant of prospecting rights" is too broad. burdensome and

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		(other than the Claimants).	paras 110-118 and 155).	Documents are also relevant and material to the State's merits defence.	<p>unspecific;</p> <p>ii. the burden on the State to identify and produce such documents is disproportionate and if Documents were to be produced, if any, such Documents would not be material to the outcome of this case; and</p> <p>iii. it is a fishing expedition.</p> <p>This request by the Claimants is extremely broad as the Claimants have chosen not to narrow the request by any</p>	<p>parties in respect of Mrima Hill is very specific.</p> <p>However, in the interests of cooperation, the Claimants will narrow this DPR temporally such that it applies to documents created from 1 January 2007 onwards.</p> <p>Such Documents are relevant to the State's motivation for revoking SML 351 (including resource nationalism) and, hence, material to the case on liability.</p> <p>The Claimants</p>	<p>lacks probative value.</p> <p>DPR 53 is REJECTED.</p>

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					<p>element of time, Government department or agency, individual or other specifics. Therefore, an obligation on the State to identify and produce all Documents "<i>giving consideration to or discussing</i>" prospecting or mining interests in Mrima Hill at any point in time is overly broad and burdensome.</p> <p>Further, the State does not agree that any responsive Documents would in fact be relevant or material to the State's alleged revocation of SML 351 or determinative of the</p>	maintain this DPR.	

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No.	Req. Party	Documents or Category of Documents Requested By Claimants	Relevance and Materiality According to Requesting Party		Responses/ Objections to Document Request	Reply to Objections to Document Requests	Tribunal's Decision
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					<p>Claimants' expropriation claim.</p> <p>This is another example of a fishing expedition by the Claimants in order to obtain material to support an unsubstantiated argument on "resource nationalism".</p>		
54.	CI	Copies of applications within the custody, possession or control of the Relevant Government Agencies for prospecting rights or prospecting/mining licences or leases over Mrima Hill filed by third parties since 5 August 2013.	The Claimants allege that the expropriation of its investments (and breach of FET) were motivated by resource nationalism (Claimants' Memorial of Claim, paras 110-118 and 155).	The requested applications are relevant and material to the State's motivations for revoking SML 351 and to the Claimants' allegations that the revocation of SML 351 was driven by resource nationalism. These Documents are also relevant and material to the State's merits defence.	The State objects to this request on the same grounds as set out in response to the Claimants' DPR 53 above.	The Claimants do not understand the State's objections to this DPR. The State cross-refers to its objections to DPR 53, but that does not make sense. This DPR is for applications filed by third parties in respect of Mrima	The request for documents that post-date the alleged taking of the Claimants' investment lacks relevance. DPR 54 is REJECTED.

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						Hill; DPR 53 is for Documents that record/reflect State officials giving consideration to or discussing the grant of prospecting rights or prospecting/mining licences or leases over Mrima Hill to third parties. The requested Documents are clearly relevant to the State's motivation for revoking SML 351 (including resource nationalism) and, hence, material to the case on liability.	
55.	CI	Documents within the custody, possession or control of the Relevant	The Claimants allege that the expropriation of its investments (and	The requested Documents are relevant and material to (1): whether the revocation	The State objects to this request on the	The requested Documents are relevant to the	The request as framed is far too broad. The

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No.	Req. Party	Documents or Category of Documents Requested By Claimants	Relevance and Materiality According to Requesting Party		Responses/ Objections to Document Request	Reply to Objections to Document Requests	Tribunal's Decision
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		Government Agencies or other government departments responsible for international trade and investment that record or reflect negotiations or agreements for the supply of niobium and/or rare earth elements by the State (or any State-owned or controlled entity, including but not limited to the National Mining Corporation) to third parties between 9 April 2013 and the present.	breach of FET) were motivated by resource nationalism (Claimants' Memorial of Claim, paras 110-118 and 155). The State alleges that the State's motive for the revocation was that it was getting tough on corruption (State's Counter-Memorial, para 147).	was motivated or caused by the interests of third parties; and (2) the State's motivation of resource nationalism.	basis that: i. the Documents sought are not sufficiently relevant or material to the outcome of the case; ii. the Documents are subject to commercial confidentiality; and iii. it is a fishing expedition. This request is not confined to Documents that relate to Mrima Hill and, therefore, any Documents that relate to the supply of niobium and/or rare earth elements	State's motivation for revoking SML 351 and, hence, material to the case on liability. The State's suggestion that the Claimants' case on resource nationalism is unsubstantiated is blind to the evidence the Claimants have already adduced. The Claimants' resource nationalism case is set out at paragraphs 110 to 118 of the Claimants' Memorial of Claim. However, it is of course logical that, as the exclusive	confidentiality interest of any "third parties" who may or may not have been in negotiation with the Respondent in the last four years outweighs any probative value in relation to the dispute before this Tribunal. DPR 55 is REJECTED.

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					<p>more generally and which are entirely unconnected to this case, would be captured by this request.</p> <p>Further, in circumstances where there is no licence for the State or any third party to mine at Mrima Hill, there is no reasonable basis for believing that responsive Documents that relate to Mrima Hill exist.</p> <p>In any event, if such negotiations and discussions had occurred these would be subject to commercial confidentiality under</p>	<p>custodian of most documents concerning the State's resource nationalism agenda, only the State will have such material. The State's attempt to exploit its position as exclusive custodian of this evidence is unfair.</p> <p>As regard the State's vague reference to "<i>commercial confidentiality under the laws of Kenya</i>", this should be given no credit by the Tribunal. In any event, if confidentiality is a genuine concern, the Claimants are willing to give the</p>	

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					<p>the laws of Kenya.</p> <p>Finally, this is another example of a fishing expedition by the Claimants to obtain material to support an unsubstantiated argument on "resource nationalism" and discrimination in favour of third parties.</p>	<p>necessary undertakings.</p> <p>As to the State's objection that this "<i>request is not confined to Documents that relate to Mrima Hill</i>", the Claimants are willing to narrow this DPR down accordingly, such that it is reframed as follows (with the narrowing amendment underlined):</p> <p><i>"Documents within the custody, possession or control of the Relevant Government Agencies or other government</i></p>	

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						<p><i>departments responsible for international trade and investment that record or reflect negotiations or agreements for the supply of niobium and/or rare earth elements by the State (or any State-owned or controlled entity, including but not limited to the National Mining Corporation) from <u>Mrima Hill</u> to third parties between 9 April 2013 and the present."</i></p>	
e. Motive							
56.	CI	Documents recording or reflecting the aims and objectives for the introduction of mining	The Claimants allege that the expropriation of its investments (and breach of FET) were	The requested Documents are relevant and material to the State's motivation of	The State objects to this request on the basis that:	The Claimants do not accept the State's objections	DPR is excessive and not material. Whether or not the Respondent was

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		<p>related bills, legislation, rules, regulations and policies since 1 July 2007 concerning:</p> <p>(a) royalties;</p> <p>(b) foreign investors;</p> <p>(c) local equity participation;</p> <p>(d) free-carried interests; and/or</p> <p>(e) government ownership,</p> <p>including discussion of drafts.</p>	<p>motivated by resource nationalism (Claimants' Memorial of Claim, paras 110-118 and 155).</p> <p>The State alleges that the State's motive for the revocation was that it was getting tough on corruption (State's Counter-Memorial, para 147).</p>	<p>resource nationalism.</p>	<p>i. the request is unreasonably broad and unspecific;</p> <p>ii. the Documents sought are not sufficiently relevant or material to the outcome of the case; and</p> <p>iii. it is a fishing expedition.</p> <p>The request is unreasonably broad as the Claimants have not specified where the searches should be undertaken and consequently the burden on the State to identify and produce all "documents recording or</p>	<p>to this DPR.</p> <p>The State's Illegality Objection puts a broad range of the State's laws and policies in issue. These documents go directly to the origins of these policies and their application to the Claimants.</p> <p>The request is also not unreasonably broad – it is confined to specific issues concerning the State's mining laws and regulations.</p> <p>As to the State's contention that "this request is not sufficiently relevant</p>	<p>pursuing a policy of "resource nationalism" will be reflected in publicly available mining related bills, legislation rules and regulations. The Tribunal does not accept the Claimants' argument that "the subjective intent of the State as legislator and policy maker is what is relevant here", even if it could be said that a State as such has a "subjective intent"</p> <p>DPR 56 is REJECTED.</p>

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			Reference to Submissions	Comments			
					<p><i>reflecting the aims and objectives for the introduction of mining related bills, legislation, rules, regulations and policies" is disproportionate and unreasonably burdensome. In addition, if Documents were to be produced, if any, such Documents would not be material to the outcome of this case.</i></p> <p>Further, this request is not sufficiently relevant or material to the outcome of the case because as a matter of Kenyan law, the meaning and effect of legislation is to be derived from the plain reading of</p>	<p><i>or material to the outcome of the case because as a matter of Kenyan law, the meaning and effect of legislation is to be derived from the plain reading of the legal instrument itself", that is beside the point. The Claimants do not seek these documents to establish their meaning or effect under local law, but rather as part of a case in which the State's motive for violation of a treaty is in issue. The subjective intent of the State as legislator and policy-maker is what is relevant</i></p>	

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					<p>the legal instrument itself.</p> <p>The Claimants have not impugned any of the mining related bills, legislation, rules, regulations and policies of the State anywhere in their pleadings, or in this document request. Therefore, the Claimants have failed to explain the relevance and materiality of the requested Documents, instead using it as a fishing expedition to obtain material to support an unsubstantiated argument on "resource nationalism".</p>	<p>here, not the objective meaning of the words the State has used to implement its policies.</p> <p>The State's suggestion that the Claimants have not impugned the relevant laws, rules and regulations also misses the point. The Claimants' case is that the State implemented its resource nationalism agenda through these instruments. The validity of the instruments is moot.</p> <p>The Claimants' resource</p>	

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						nationalism case is set out at paragraphs 110 to 118 of the Claimants' Memorial of Claim.	
57.	Cl	Documents created since 9 April 2013 recording or discussing the establishment, constitution, mandate, objectives and property (including leases and licences) of the National Mining Corporation.	<p>The Claimants allege that the expropriation of its investments (and breach of FET) were motivated by resource nationalism (Claimants' Memorial of Claim, paras 110-118 and 155).</p> <p>The State alleges that the State's motive for the revocation was that it was getting tough on corruption (State's Counter-Memorial, para 147).</p>	The requested Documents are relevant and material to the State's motivation for the revocation of SML 351, including whether the decision to revoke SML 351 was motivated by considerations of resource nationalism.	<p>The State objects to this request on the basis that any Documents that record or discuss the establishment, constitution, mandate and objectives of the National Mining Corporation are in the public domain.</p> <p>Further, the National Mining Corporation is not currently operational and does not hold any leases or licences at present and accordingly Documents recording</p>	The Claimants are willing to narrow-down this DPR such that the State produces only those responsive Documents that are not in the public domain.	<p>This request is excessively broad in terms of the issues before the Tribunal.</p> <p>DPR 57 is REJECTED.</p>

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			Reference to Submissions	Comments			
					leases or licences do not exist.		
58.	CI	Documents recording or reflecting prospecting, exploration or other mining-related activities conducted within the area covered by SML 351 from 5 August 2013 to the present.	The Claimants allege that the expropriation of its investments (and breach of FET) were motivated by resource nationalism (Claimants' Memorial of Claim, paras 110-118 and 155). The State alleges that the State's motive for the revocation was that it was getting tough on corruption (State's Counter-Memorial, para 147).	The requested Documents are relevant and material to: (1) SML 351 being revoked, not suspended; and (2) the revocation being motivated or caused by interests of third parties.	No prospecting, exploration or other mining-related activities have been conducted within the area covered by SML 351 since 5 August 2013 and, therefore, there are no Documents in existence that are responsive to this document request.	Noted.	The Claimants have "noted" the State's explanation and has not requested any order in relation to this item.
V. Valuation							
59.	CI	Documents within the custody, possession or control of the Relevant Government Agencies recording or reflecting the presence, orebody size,	The State alleges that the Claimants cannot establish with any reasonable certainty that Mrima Hill would generate a profit (State's	The requested Documents are relevant and material to the value and profitability of the Mrima Hill project (<i>lucrum cessans</i>).	Pursuant to Procedural Order No. 3 dated 6 June 2016, quantum is not being determined in this phase of the	The Claimants agree with the State's suggestion that the requested Documents need not be produced	The tribunal notes the in light of the Tribunal's order deferring consideration of "loss of profits" to a

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No.	Req. Party	Documents or Category of Documents Requested By Claimants	Relevance and Materiality According to Requesting Party		Responses/ Objections to Document Request	Reply to Objections to Document Requests	Tribunal's Decision
			Reference to Submissions	Comments			
		grade or other characteristics of niobium mineralisation at Mrima Hill.	Counter-Memorial, para 557).	The requested Documents will be provided to the Claimants' expert witness to value and assess the profitability of the Mrima Hill project (<i>lucrum cessans</i>).	<p>arbitration. Accordingly, the requested Documents should not be produced at this stage of the proceedings.</p> <p>Further, the State objects to this request on the basis that the Documents sought are already in the Claimants' custody, possession or control.</p> <p>The Claimants themselves state that "[t]hanks to the Claimants, the State now has the geological data for Mrima Hill" as the "Claimants have provided to the State their IP drilling and geological data,</p>	<p>until the Phase on Quantum (as that phase is described in Procedural Order No. 3). To this end, the Claimants agree to defer this DPR until the Phase on Quantum begins.</p> <p>At this time, the Claimants make no comment on the State's other responses to this DPR. The Claimants' reserve their rights to contest the State's objections to this DPR in the Phase on Quantum.</p>	<p>later phase (in any) of the arbitration, the Claimants have agreed to the adjournment of this request to that later phase.</p> <p>As this request is not pursued at this stage, no order is made.</p>

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No.	Req. Party	Documents or Category of Documents Requested By Claimants	Relevance and Materiality According to Requesting Party		Responses/ Objections to Document Request	Reply to Objections to Document Requests	Tribunal's Decision
			Reference to Submissions	Comments			
					<p><i>exploration reports, mine development know-how and other technical information"</i> (Claimants' Memorial, para. 207). In addition, Pacific Wildcat released information on the mineralisation at Mrima Hill into the public domain, such as by way of the press release exhibited at Exhibit C-11 and Exhibit R-129.</p> <p>Accordingly, the Claimants' document request is contrary to its pleaded case in its Memorial as all of the Documents in the State's possession, custody and control that record or reflect</p>		

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No.	Req. Party	Documents or Category of Documents Requested By Claimants	Relevance and Materiality According to Requesting Party		Responses/ Objections to Document Request	Reply to Objections to Document Requests	Tribunal's Decision
			Reference to Submissions	Comments			
					<p>the presence, orebody size, grade or other characteristics of niobium were allegedly provided to the State by the Claimants themselves.</p> <p>The Documents sought would go to the valuation of Mrima Hill and the State contends that the burden is on the Claimants to prove quantum, should there be a quantum phase of the proceedings, not on the State.</p>		
60.	Cl	Documents within the custody, possession or control of the Relevant Government Agencies recording or reflecting the	The State alleges that the Claimants cannot establish with any reasonable certainty that Mrima Hill would	The requested Documents are relevant and material to the value and profitability of the Mrima Hill project	The State objects to this request on the same grounds as set out in response to the Claimants' DPR 59	The Claimants repeat their reply under DPR 59 above.	<p>The Tribunal repeats its observation in relation to DPR 59.</p> <p>As this request is not</p>

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No.	Req. Party	Documents or Category of Documents Requested By Claimants	Relevance and Materiality According to Requesting Party		Responses/ Objections to Document Request	Reply to Objections to Document Requests	Tribunal's Decision
			Reference to Submissions	Comments			
		presence, orebody size, grade or other characteristics of rare earths mineralisation at Mrima Hill.	generate a profit (State's Counter-Memorial, para 557).	(<i>lucrum cessans</i>). The requested Documents will be provided to the Claimants' expert witness to value and assess the profitability of the Mrima Hill project (<i>lucrum cessans</i>).	above.		pursued at this stage, no order is made.
61.	CI	Documents within the custody, possession or control of the Relevant Government Agencies recording or reflecting the results of sampling, drilling, metallurgical test work, modelling or other mineral evaluation processes performed in relation to Mrima Hill.	The State alleges that the Claimants cannot establish with any reasonable certainty that Mrima Hill would generate a profit (State's Counter-Memorial, para 557).	The requested Documents are relevant and material to the value and profitability of the Mrima Hill project (<i>lucrum cessans</i>). The requested Documents will be provided to the Claimants' expert witness to value and assess the profitability of the Mrima Hill project (<i>lucrum cessans</i>).	The State objects to this request on the same grounds as set out in response to the Claimants' DPR 59 above.	The Claimants repeat their reply under DPR 59 above.	The Tribunal repeats its observation with respect to DPR 59. As this request is not pursued at this stage, no order is made.
62.	CI	Documents within the custody, possession or control of the Relevant Government Agencies that	The State alleges that the Claimants cannot establish with any reasonable certainty that	The requested Documents are relevant and material to the value and profitability of the Mrima Hill project	The State objects to this request on the same grounds as set out in response to the	The Claimants repeat their reply under DPR 59	The Tribunal repeats its observation with respect to DPR 59.

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No.	Req. Party	Documents or Category of Documents Requested By Claimants	Relevance and Materiality According to Requesting Party		Responses/ Objections to Document Request	Reply to Objections to Document Requests	Tribunal's Decision
			Reference to Submissions	Comments			
		record or reflect State officials discussing the size, scale or value of minerals located at Mrima Hill.	Mrima Hill would generate a profit. (State's Counter-Memorial, para 557).	<i>(lucrum cessans)</i> .	Claimants' DPR 59 above.	above.	As this request is not pursued at this stage, no order is made.
63.	CI	Documents within the custody, possession or control of the Relevant Government Agencies that record or reflect State officials making, receiving or considering proposals for major infrastructure development in or around the Port of Mombasa.	The State alleges that the Claimants cannot establish with any reasonable certainty that Mrima Hill would generate a profit. (State's Counter-Memorial, para 557).	The requested Documents are relevant and material to the value and profitability of the Mrima Hill project <i>(lucrum cessans)</i> .	The State objects to this request on the same grounds as set out in response to the Claimants' DPR 59 above. In addition, the State objects to this request on the basis that: i. the Documents sought are not sufficiently relevant or material to the outcome of the case; ii. the request is unreasonably	The Claimants repeat their reply under DPR 59 above.	The Tribunal repeats its observation with respect to DPR 59. As this request is not pursued at this stage, no order is made.

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No.	Req. Party	Documents or Category of Documents Requested By Claimants	Relevance and Materiality According to Requesting Party		Responses/ Objections to Document Request	Reply to Objections to Document Requests	Tribunal's Decision
			Reference to Submissions	Comments			
					<p>broad and unspecific;</p> <p>iii. it is a fishing expedition; and</p> <p>iv. the Documents are subject to commercial confidentiality.</p> <p>The request is unreasonably broad as the Claimants have requested Documents relating to <u>any</u> infrastructure proposals in or around the Port of Mombasa.</p> <p>The Claimants have not pleaded a case on specific projects "<i>in or around the Port of Mombasa</i>" which would have any impact on the</p>		

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			Reference to Submissions	Comments			
					<p>valuation of Mrima Hill and therefore this request is not sufficiently relevant or material to the outcome of the case.</p> <p>This is a fishing expedition by the Claimants as no nexus is established between Mrima Hill and the Port of Mombasa (apart from their locations both being in south-west Kenya). Further, there is no mine at Mrima Hill to be valued for profitability; the Claimants' request is merely hypothetical.</p> <p>Further, any such Documents as related to commercial proposals for</p>		

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No.	Req. Party	Documents or Category of Documents Requested By Claimants	Relevance and Materiality According to Requesting Party		Responses/ Objections to Document Request	Reply to Objections to Document Requests	Tribunal's Decision
			Reference to Submissions	Comments			
					<p>development around the Port of Mombasa would be subject to commercial confidentiality under the laws of Kenya.</p> <p>Finally, the Documents sought would go to the valuation of Mrima Hill and the State contends that the burden is on the Claimants to prove quantum, should there be a quantum phase of the proceedings, not on the State.</p>		
VI. Jacob Juma							
64.	CI	The complete investigation file created	The Claimants contend that Mr Juma was	The requested documents are relevant and material to	The National Police Service (or other	The State must produce these	The Tribunal does not consider that the

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		and maintained by the State police (or other law enforcement agencies) concerning the circumstances and causes of the death of Jacob Juma on 5 May 2016.	present when State officials attempted to solicit bribes, payments or concessions (see for example Claimants' Memorial of Claim, paras 91 and 109, CWS-1 Anderson, para 173, Exhibit C-102). In his sworn affidavit dated 6 May 2015 (Exhibit C-139), Mr Juma alleged that " <i>unless CMK paid CS Balala Kshs 80 million, CS Balala would revoke SML 351</i> " (Claimants' Memorial of Claim, para 91). The State alleges that Mr Juma was involved with the Claimants in " <i>a course of conduct to</i>	the Claimants' allegation that CS Balala attempted to solicit a bribe from the Claimants. In his affidavit filed with the Claimants' Memorial of Claim, Mr Juma made serious allegations of corruption against CS Balala in relation to the revocation of SML 351. The question arises as to how the Tribunal should deal with Mr Juma's evidence now that he is dead. The circumstances and causes of his death are relevant and material in this context. The State makes serious allegations of corruption against Mr Juma. He and Commissioner Masibo are	enforcement agencies) ¹³ are independent agencies, ¹⁴ and are not under the direction or control of the Government. Accordingly, it is not in the State's power to compel those agencies to produce any responsive Documents. Further, the State objects to the Claimants' reference to Jacob Juma's " <i>affidavit filed with the Claimants' Memorial of Claim</i> " in connection with Mr Juma's death.	documents. One of CMK's board members was killed in the State's capital during these proceedings. In any other case, this would be a major issue. The Claimants have not alleged that the State or its agents killed Mr Juma. The Claimants do not know who is responsible. Getting clarity on that point is the very reason that the	investigative file into the death of Jacob Juma on 5 May 2016 is material to this proceeding DPR 64 is REJECTED.

¹³ The National Police Service Commission is created and provided for under Article 248 of the Constitution. Further, the National Police Service (of which the Directorate of Criminal Investigations is part) was established under Article 243 of the Constitution.

¹⁴ Article 249(2) of the Constitution.

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			Reference to Submissions	Comments			
			<p><i>procure a mining lease illegally"</i> (State's Counter-Memorial, paras 126 and 136).</p> <p>Mr Juma was killed on the same day (shortly after) the Claimants filed their Memorial of Claim. His sworn affidavit was filed with the Claimants' Memorial of Claim (Exhibit C-139).</p> <p>In the State's Counter-Memorial, the State has relied on a press article that draws links between Mr Juma's death and CMK's project at Mrima Hill (Exhibit R-088).</p>	<p>the central figures in the State's Corruption Objection.</p> <p>Mr Juma is unable to answer questions regarding his affidavit or respond to the allegations the State makes against him. The question arises as to how the Tribunal should deal with Mr Juma's evidence now that he is dead. The circumstances and causes of his death are also relevant and material in this context.</p>	<p>This statement by the Claimants is misleading, as the affidavit sworn by Mr Juma was filed previously in Judicial Review proceedings in the Kenyan courts and is only an exhibit to the Claimants' Memorial. Importantly, the Claimants chose not to put forward Mr Juma as a witness in these arbitration proceedings, notwithstanding that the Memorial was finalised and served before Mr Juma's death. Accordingly, it is quite incorrect of the Claimants to say that the "<i>circumstances and causes of [Mr Juma's] death are</i></p>	<p>Claimants requested these documents.</p> <p>As noted above, the Republic of Kenya participates in this arbitration as a single entity. Any Documents within the custody, possession or control of the National Police Service (or other enforcement agencies) are <i>de jure</i> within the custody, possession or control of the Republic of Kenya.</p> <p>The State plainly cannot use its own internal constitutional arrangements to evade an obligation</p>	

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					<p><i>relevant and material".</i></p> <p>The State also considers that it is not appropriate for the Claimants to rely on press speculation in respect of the perpetrator of Mr Juma's death. There has been much speculation in the press regarding Mr Juma's death, including allegations made against various business associates and others.</p> <p>The State objects to the Claimants' continued unsubstantiated insinuations of State involvement in Mr Juma's death, which are highly</p>	<p>to produce documents that arises under international law. To do so would be to make a mockery of the document production process and equal treatment.</p> <p>The Claimants take issue with the State's allegation that the Claimants have been "<i>misleading</i>" in their statement that Mr Juma's affidavit was "<i>filed with the Claimants' Memorial of Claim</i>". Mr Juma's affidavit was filed with the Claimants' Memorial of Claim (as Exhibit C-139). The State's</p>	

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					inappropriate.	<p>allegation that the Claimants have been "<i>mislading</i>" in this regard is unprofessional and should be withdrawn.</p> <p>The State's suggestion that the Claimants made a forensic decision not to call Mr Juma is unfounded and obviously speculative. The reality is that the need to call Mr Juma arose only after the State made illegality and corruption allegations concerning Mr Juma in its Counter-Memorial, by which time he was dead. Up until</p>	

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						<p>this point, the only relevant evidence Mr Juma had to give was that contained in his affidavit, which the Claimants filed with their Memorial of Claim.</p> <p>As to the State's remark that "<i>it is not appropriate for the Claimants to rely on press speculation in respect of the perpetrator of Mr Juma's death</i>", this is outright hypocrisy. The State itself has relied on a press article that draws links between Mr Juma's death and CMK's project at</p>	

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						Mrima Hill (Exhibit R-088), and has also referred to newspaper articles in its general attack on Mr Juma's character (see, for example, para 119 of the State's Counter-Memorial).	
65.	CI	Copies of Documents collected or seized by the State police (or other law enforcement agencies) from the person, vehicle, residence, business premises or other property of Jacob Juma during the investigation into his death that contain the words: (i) "Cortec";	The Claimants allege that Mr Juma was present when State officials attempted to solicit bribes, payments or concessions (see for example Claimants' Memorial of Claim, paras 91 and 109). The State alleges that Mr Juma was involved with the Claimants in " <i>a course of conduct to procure a mining lease</i>	The requested Documents are relevant and potentially material to the Claimants' allegation that government officials attempted to solicit a bribe from CMK via Mr Juma. They are also relevant and material to the State's allegations of corruption regarding Mr Juma's involvement in the issuance of SML 351.	The State objects to this request on the same grounds as set out in response to the Claimants' DPR 64 above.	The State's grounds of objection to DPR 64 do not provide a basis for objecting to DPR 65. The State has made corruption allegations concerning Mr Juma. Accordingly the requested Documents are relevant and	Although DPR 65 is narrower than DPR 64, the Tribunal repeats its observation that the circumstances of the death of Mr. Juma does not warrant such an excessively broad demand for production of documents. DPR 65 is

1	2	3	4		5	6	7
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		(ii) "Cortec Mining"; (iii) "Cortec Mining Kenya"; (iv) "Cortec Mining Kenya Ltd"; (v) "SML 351"; (vi) "Special Mining Licence 351"; (vii) "Mrima Hill"; (viii) "Mrima"; (ix) "Pacific Wildcat"; (x) "PAW"; (xi) "Balala"; or (xii) "Masibo".	<i>illegally</i> " (State's Counter-Memorial, paras 126 and 136).			material to the State's Corruption Objection. For the reasons explained in DPR 64, the State's internal constitutional barriers are irrelevant to its document production obligations in this arbitration.	REJECTED

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

ICSID CASE NO. ARB/15/29

CORTEC MINING KENYA LIMITED

First Claimant

CORTEC (PTY) LTD

Second Claimant

STIRLING CAPITAL LIMITED

Third Claimant

-and-

THE REPUBLIC OF KENYA

Respondent

RESPONDENT'S DOCUMENT REQUESTS

9 February 2017

DLA Piper UK LLP

3 Noble Street

London

EC2V 7EE

Isema, Kamau & Maema Advocates

5th Floor, Tower A

5th Ngong Avenue

Nairobi

The Respondent requests that the Claimants produce the documents or categories of documents identified below. For the avoidance of doubt, each of these requests relates to specific documents or specific categories of documents that are reasonably believed to exist and to be in the possession, custody, or control of the Claimants. The Respondent confirms that it has made and continues to make its best efforts to determine whether any of the requested documents in categories 12 and 50 are already within its possession, custody or control and, to the best of the Respondent's knowledge, it does not have such documents in its possession, custody or control, but will forthwith advise the Claimants if any such documents so described are found to be in its possession, custody or control (save for those documents which are already on the record in the these proceedings and/or in the judicial review proceedings). As the Respondent does not pursue, or has narrowed the scope of, some of its original document requests, there are no other requests being pursued for documents which might reasonably be believed to be in the Respondent's possession, custody or control.

The following defined terms are used in connection with these requests:

"**Claimants' Memorial**" means the Claimants' Memorial of Claim dated 5 May 2016.

"**Respondent's Counter-Memorial**" means the Respondent's Counter-Memorial on the Merits and Memorial on Objections to Jurisdiction dated 5 October 2016.

"**Claimants' Counter-Memorial**" means the Claimants' Counter-Memorial on Preliminary Objections dated 25 January 2017.

"**Claimants**" means any of the Claimants, including any of the Claimants' representatives, officers and agents, including but not limited to Mr David Anderson, Mr Francis Donald O'Sullivan, Mr Jacob Juma and Mr Darren Townsend.

"**Respondent**" means the Republic of Kenya, including its ministries, departments, and agencies, as well as their representatives, officers and employees.

"**PAW**" means Pacific Wildcat Resources Corp.

"**Document**" means all writings of any kind, whether recorded on paper, electronic means, audio or visual recordings, or any other mechanical or electronic means of storing or recording information, including but not limited to all communications (including reports, memoranda, presentations, letters, and E-mail, facsimile correspondence, instant messaging services such as WhatsApp, iMessage or their equivalent), agenda for meetings, notes, meeting minutes, transcripts, talking points, pitch books, speeches, financial statements, and proposals. Documents to be produced in native files with original metadata intact.

"**Email**" means any and all emails including, but not limited to, those sent to or received from the following addresses:

- cortec@global.co.za
- don.osullivan@generalcorp.com.au
- jumajacob@myway.com
- info@pacificwildcat.com
- downsend@pacificwildcat.com

"**Concerning**" means addressing, relating to, referring to, describing, discussing, identifying, evidencing, constituting, and recording.

"**Including**" means "including, but not limited to...".

The use of the singular form of any word includes the plural and vice versa.

The use of headers below is for convenience only and does not limit or alter the nature of the specific itemised requests herein.

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No.	Req. Party	Documents or Category of Documents Requested	Relevance and Materiality According to Requesting Party		Responses/ Objections to Document Request	Reply to Objections to Document Requests	Tribunal's Decision
			Reference to Submissions	Comments			
Categories:							
<ul style="list-style-type: none"> A. The legality of the alleged investments (p.184) B. Other jurisdictional issues (p.275) C. Alleged legitimate expectations (p.318) D. Alleged expropriation (p.365) E. Quantum (p.383) F. Other (p.426) 							
A. The legality of the alleged investments							
1.	R	All documents evidencing communications between the Claimants <i>inter se</i> and/or any employee and/or official of the Respondent relating to the procurement of the letters issued by the Ministry of Environment and Natural Resources and the Office of the President on or around 15 May 2007.	Claimants' Memorial, paragraph 27 Exhibit C-131	The documents are relevant and material to establishing the relationship between the Claimants and employees and/or officials of the Respondent which resulted in the procurement of the letters dated 15 May 2007.	The Claimants object to this DPR on the following grounds: <u>Documents within the possession, custody or control of the State</u> The State has failed to state (as required by Article 3(c) of the IBA Rules) that the	The State notes the Claimants' objections to this DPR. The State fully reserves its position in respect of those objections but, in the interests of cooperation, confirms that it does not intend to pursue this DPR.	The Tribunal notes that the Respondent does not intend to pursue this DPR. As this request is not pursued, no order is made.

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					<p>communications requested are not in the possession, custody or control of the State or make a statement explaining the reasons why it would be unreasonably burdensome for the State to produce such communications.</p> <p>Instead, the State remarks in its introductory section that "<i>it has made and continues to make its best efforts to determine whether any of the requested documents in categories 1, 5, 9, 10, 12, 28, 29, 41, 43, 44, 47, 48 and 50 are already within its possession, custody or control and, to the best of the</i></p>		

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					<p><i>Respondent's knowledge, it does not have such documents in its possession, custody or control, but will forthwith advise the Claimants if any such documents so described are found to be in its possession, custody or control (save for those documents which are already on the record in these proceedings)".</i></p> <p>In this DPR, the State is requesting communications between the Claimants and State employees or officials: by their very nature, these documents are self-evidently within the State's possession,</p>		

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					<p>custody or control (or, at the very least, ought to be).</p> <p>The Claimants should not be forced to take on the burden of searching for documents that the State has or ought to have but has not been able to locate. As noted in a recently-published text on document production in international arbitration: "[t]o the extent a party may have the [requested] documents within its possession, or has access to them, document disclosure from its opponent is</p>		

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					<p><i>generally not to be ordered.</i>"¹⁵</p> <p>The unreasonableness of this State DPR is increased by the fact that the State has not offered any credible explanation for how these documents are relevant (let alone material) to a fact in issue.</p> <p><u>Relevance</u>¹⁶</p> <p>The "<i>relationship between the Claimants and employees and/or officials of the Respondent which resulted in the procurement of the</i></p>		

¹⁵ N. D. O'Malley, *Rules of Evidence in International Arbitration – An Annotated Guide* (Informa, 2012), p.44

¹⁶ IBA Rules, Article 9(2)(a).

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					<p><i>letters dated 15 May 2007"</i> does not relate to an issue in dispute between the Claimants and the State.</p> <p>In attempting to justify this DPR, the State has not specified any reference to its own case. This is, presumably, because the State's Counter-Memorial does not dispute the factual narrative given at paragraph 27 of the Claimants' Memorial. Nor does the State refer to Exhibit C-131 at any point in its Counter-Memorial.</p> <p>Fundamentally, the State's pleadings do not contain any</p>		

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					<p>allegation regarding the circumstances in which the letters dated 15 May 2007 were issued, and so the requested communications are irrelevant to the State's case as pleaded.</p> <p><u>Materiality</u>¹⁷</p> <p>For the same reasons, the requested communications are immaterial. The State has failed to show how either side's case could be helped or harmed by the communications it requests. According to Nathan O'Malley, author of a</p>		

¹⁷ IBA Rules, Article 9(2)(a).

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					<p>leading text on the rules of evidence in international arbitration: "[a] document is material to the outcome of the case if it is needed to allow complete consideration of the factual issues from which the legal conclusions are drawn".¹⁸</p> <p>Whether on this or any other definition of "materiality", the documents requested by the State in this DPR are not material.</p> <p><u>Unreasonable burden</u>¹⁹</p>		

¹⁸ See R Marghitola, *Document Production in International Arbitration* (Kluwer, 2015) pp.52 – 53.

¹⁹ IBA Rules, Article 9(2)(c).

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No.	Req. Party	Documents or Category of Documents Requested	Relevance and Materiality According to Requesting Party		Responses/ Objections to Document Request	Reply to Objections to Document Requests	Tribunal's Decision
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					Given the State's failure to properly confirm that it does not have the requested documents within its possession, custody or control it is unreasonable to shift the burden and costs of searching for the requested communications to the Claimants. This is especially so, given that the State has not demonstrated how the requested documents are relevant, let alone material.		
2.	R	Documents evidencing communications between the Claimants <i>inter se</i> in respect of the approvals required from Kwale	Claimants' Memorial, paragraph 27 Exhibit C-131 See, also, for example,	These documents are relevant and material to evidencing the Claimants' knowledge of the requirement for approval	The Claimants object to this DPR on the following grounds: <u>Relevance</u> ²⁰	The State notes the Claimants' objections to this DPR. The State fully reserves its	The Tribunal notes that the respondent does not intend to pursue this DPR.

²⁰ IBA Rules, Article 9(2)(a).

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		County Council.	Exhibits R-80, R-113 and R-114	from Kwale County Council and the extent to which such approval was obtained.	The Claimants' <i>"knowledge of the requirement for approval from Kwale County Council and the extent to which such approval was obtained"</i> does not relate to an issue in dispute between the Claimants and the State. In attempting to justify this DPR, the State has not specified any reference to its own case and does not in its own Memorial dispute the factual narrative given at paragraph 27 of the Claimants' Memorial – nor does the State refer to Exhibit C-131 at any point in its Counter-Memorial. Specifically, the	position in respect of those objections but, in the interests of cooperation, confirms that it does not intend to pursue this DPR.	As this request is not pursued, no order is made.

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					<p>State makes no allegation regarding the approvals required from Kwale County Council (or the Claimants' knowledge that such approvals were required).</p> <p>Further, the State's attempted justification for this DPR is flawed: Exhibits R-80, R-113 and R-114 are letters that the State adduces to support its allegation that the "<u>Kwale county community</u>" (underline added) objected to the Claimants' investment in Mrima Hill (State's Counter-Memorial, para 404). They have nothing to do with approvals</p>		

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					<p>from the Kwale County <u>Council</u> or "<i>the Claimants' knowledge of the requirement for approval from Kwale County <u>Council</u> and the extent to which such approval was obtained</i>" (underline added).</p> <p><u>Materiality</u>²¹</p> <p>The requested communications are not relevant to an issue in dispute, so they cannot be material to the outcome of the case. The State has failed to show how either side's case could be helped or harmed by the communications</p>		

²¹ IBA Rules, Article 9(2)(a).

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					<p>it requests.</p> <p><u>Unreasonable burden</u>²²</p> <p>In circumstances where the State has not made any case on relevance or materiality, the Claimants consider that it is not reasonable for them to be burdened with searching for these documents.</p>		
3.	R	Documents evidencing communications between the Claimants and the Kaya Elders, including the Kaya Mrima Self Help Group [KMSHG] and any of its representatives.	Exhibits C-40 Respondent's Counter-Memorial, paragraph 99 Exhibit R-76	These documents are relevant and material to demonstrating the Claimants' conduct in procuring the purported investment, the opinions of the local community in relation to the Mrima Hill	<p>The Claimants object to this DPR on the following grounds:</p> <p><u>Relevance</u>²³</p> <p>The State has not explained how the "<i>opinions of the local</i></p>	The State replies to the Claimants' grounds of objection to this DPR on the following basis: <u>Relevance</u>	Despite the controversy over the role and origins of the Memorandum of Understanding dated 17 August 2011 between PAW [contended by the

²² IBA Rules, Article 9(2)(c).

²³ IBA Rules, Article 9(2)(a).

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No.	Req. Party	Documents or Category of Documents Requested	Relevance and Materiality According to Requesting Party		Responses/ Objections to Document Request	Reply to Objections to Document Requests	Tribunal's Decision
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				<p>project and the procurement of the Memorandum of Understanding dated 17 August 2011 (Exhibit R-76).</p>	<p><i>community in relation to the Mrima Hill project and the procurement of the Memorandum of Understanding dated 17 August 2011</i>" are relevant to either side's case. The State places this DPR in a general category of requests relating to "[t]he <i>legality of the alleged investments</i>", but no attempt has been made to link the requested documents to any matter of law. Paragraph 99 of the State's Counter-Memorial is limited to stating that "<i>the terms of the MoU are one-sided and onerous on the community group</i>" and the State goes on</p>	<p>The State asserts in its Counter-Memorial that the Claimants "<i>sought to gag the local Mrima Hill community from raising any legitimate concerns regarding CMK's future prospecting or mining activities</i>" (State's Counter-Memorial, para. 100). The role of the local Kaya elders and their observations on the Mrima Hill project are relevant to the wider issue of the Claimants' behaviour and conduct in procuring the purported mining licence and to testing the</p>	<p>Respondent to be the actual investor in the project] and the KMSHG, the request targets documents insufficiently probative to warrant compelled production.</p> <p>DPR 3 is REJECTED.</p>

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No.	Req. Party	Documents or Category of Documents Requested	Relevance and Materiality According to Requesting Party		Responses/ Objections to Document Request	Reply to Objections to Document Requests	Tribunal's Decision
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					<p>to recite terms from the MoU. The State's Counter-Memorial does not articulate how the State's allegation regarding the Kaya Mrima Self Help Group relates to any aspect of its jurisdictional objection, its admissibility objection or its defence on merits.</p> <p><u>Materiality</u>²⁴</p> <p>The State has not demonstrated relevance and so <i>a fortiori</i> the State cannot cross the materiality threshold on this DPR.</p> <p><u>Overly broad and</u></p>	<p>Claimants' contention that there was extensive local community support for the project (<i>see</i>, CWS-1 Anderson, para. 131).</p> <p>The requested Documents are also relevant to the State's jurisdiction objections, in particular to whether a substantial contribution was made by the Claimants to local economic development and whether the true investors are the Claimants or PAW.</p>	

²⁴ IBA Rules, Article 9(2)(a).

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					<p><u>unduly burdensome</u></p> <p>The State's request is very broad and is not limited by any date range, nor does it specify topics discussed between the relevant senders/recipients. Further, given the State's failure to explain its request and, taking into account the lack of significance of any document likely to be found if the requested searches were to be carried out, the Claimants consider this DPR to be unreasonable.</p>	<p>More specifically, this DPR relates to the Memorandum of Understanding dated 17 August 2011 (Exhibit R-76), an agreement between PAW and the Kaya Mrima Self Help Group ("KMSHG") which sought to prevent the "<i>local Mrima Hill community from raising any legitimate concerns regarding CMK's future prospecting or mining activities</i>" (State's Counter-Memorial, para. 100). This is relevant to establishing the Claimants' conduct in the procurement of their alleged</p>	

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						<p>investments. It is also relevant to establishing who the true investors in these proceedings are and that "<i>it is the Canadian company [PAW], and not the alleged UK investors, which is at the centre of the Mrima Hill project</i>" (State's Counter-Memorial, para. 98), given that the agreement was signed by PAW rather than the Claimants.</p> <p>Therefore, the requested Documents are sufficiently relevant to the outcome of this case.</p>	

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						<p><u>Materiality</u></p> <p>The requested Documents are material to the outcome of the case on the pleaded issues of (i) the identity of the true investor in Mrima Hill: the Claimants or PAW, (ii) the Claimants' ability to establish that a substantial contribution was made by the Claimants to local economic development and (iii) the Claimants' conduct in procuring their alleged investments.</p> <p>Therefore, on the basis of materiality under Article 9(2)</p>	

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						<p>of the IBA Rules, the requested Documents by the State under this DPR are material to the outcome of the case.</p> <p><u>Overly broad and unduly burdensome</u></p> <p>This DPR does not place an unreasonable burden on the Claimants. The text of one leading commentator on the rules of evidence in international arbitration (on which the Claimants also rely), stipulates that documents requests should:</p> <p><i>"indicate an author or a possible recipient of the</i></p>	

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						<p><i>document. A request should further define the category of documents by providing a time frame that is tied to the relevant chronology of a case.</i>"²⁵</p> <p>The State has met these requirements, as well as the provisions of Article 3.3(a) of the IBA Rules. This request is narrow and specific, and concerns a specific subject matter - communications with the Kaya elders and the KMSHG, which by their nature concern</p>	

²⁵ N. D. O'Malley, *Rules of Evidence in International Arbitration – An Annotated Guide* (Informa, 2012), p. 41.

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No.	Req. Party	Documents or Category of Documents Requested	Relevance and Materiality According to Requesting Party		Responses/ Objections to Document Request	Reply to Objections to Document Requests	Tribunal's Decision
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						<p>the Mrima Hill project. Further, this is unlikely to be a large number of Documents.</p> <p>Nonetheless, in the interests of cooperation, the State agrees to narrow its DPR to the date range 1 January 2011 (being the start of the year when the Memorandum of Understanding was signed) to 7 March 2013 (the date of the grant of SML 351).</p>	
4.	R	Documents evidencing communications between the Claimants <i>inter se</i>	CWS-2 Anderson, paragraph 113	These documents are relevant and material in demonstrating the	The Claimants object to this DPR on the	The State replies to the Claimants' grounds of	This request is a burdensome request

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		and/or with Yunis Shaik in relation to interactions with the Kaya Mrima Self Help Group and any documents recording negotiations of the Memorandum of Understanding dated 17 August 2011 (Exhibit C-76).	Exhibit R-76	Claimants' conduct in procuring the purported investments, the opinions of the local community in relation to the Mrima Hill project and the procurement of the Memorandum of Understanding dated 17 August 2011 (Exhibit R-76).	<p>following grounds:</p> <p><u>Relevance</u>²⁶</p> <p>As noted above, the State has not explained how the "<i>opinions of the local community in relation to the Mrima Hill project and the procurement of the Memorandum of Understanding dated 17 August 2011</i>" are relevant to either side's case. The State does not include any reference to any submission made by either side. Instead, the State refers to a paragraph from CWS-2 Anderson where Mr Anderson states:</p>	<p>objection to this DPR on the following basis:</p> <p><u>Relevance</u></p> <p>The State repeats its Reply to the Claimants' "<i>Relevance</i>" objection in DPR 3 above.</p> <p>In addition, we note that in this DPR, the State refers to paragraph 113 of CWS-2 Anderson. However, the Claimants have, in objecting to this DPR, incorrectly quoted the text of paragraph 111 of CWS-2 Anderson (which paragraph the State does not</p>	<p>lacking materiality.</p> <p>DPR 4 is REJECTED.</p>

²⁶ IBA Rules, Article 9(2)(a).

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					<p><i>"CMK engaged in numerous community consultations as part of the EIA process. These community consultations included a consultation at Mwabovo Village on 6 June 2011 and a consultation at Mrima TM Centre on 7 June 2011. A copy of the minutes from the 6 June 2011 consultation is attached as Exhibit C-273 and a copy of the minutes from the 7 June 2011 consultation is attached as Exhibit C-274. A copy of a presentation given at these two consultations is attached as Exhibit C-275."</i></p>	<p>rely upon to justify this DPR). In contrast, the text of paragraph 113 of CWS-2 Anderson states:</p> <p><i>"We entered into the agreement with KMSHG in order to find a mutually beneficial way forward for both CMK and KMSHG. We knew the group had concerns and we wanted to ensure that we could proceed with the project in a cooperative way. That was the purpose of the agreement."</i></p> <p>While the Documents exhibited by the Claimants at</p>	

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					<p>The documents to which Mr Anderson refers have already been produced – these include documents from the consultations process that preceded the Memorandum of Understanding dated 17 August 2011 (which has also been produced, as Exhibit C-76).</p> <p><u>Materiality</u>²⁷</p> <p>The State has made no attempt to demonstrate how these documents are material to the outcome of the case (which, on any view, they are not).</p>	<p>Exhibits C-273, C-274 and C-275 are referred to in paragraph 111 of CWS-2 Anderson, they are not referred to in paragraph 113 and do not, on their face, relate to the Memorandum of Understanding dated 17 August 2011. Accordingly, the requested Documents have not already been produced. Further, the Documents exhibited only refer to community consultations over the course of <u>two</u> days, whereas communications</p>	

²⁷ IBA Rules, Article 9(2)(a).

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						<p>with the KMSHG which culminated in the Memorandum of Understanding are likely to have spanned a longer period.</p> <p>The requested Documents are sufficiently relevant in order to establish the full extent of the communications with the KMSHG relating to the Memorandum of Understanding dated 17 August 2011.</p> <p><u>Materiality</u></p> <p>The State repeats its Reply to the Claimants' "Materiality" objection in DPR 3</p>	

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						above.	
5.	R	Documents evidencing communications between the Claimants and the Kenya Forest Service in relation to the Claimants' activities at Mrima Hill and communications between the Claimants <i>inter se</i> and/or PAW in relation thereto.	Claimants' Memorial, paragraph 43 CWS-1 Anderson, paragraph 60 Exhibits C-106 and C-212 - C-217 Respondent's Counter-Memorial, paragraphs 66 and 81 Exhibit R-45	The documents are relevant and material to: (i) the Claimants' knowledge of the restrictions and requirements imposed by the Kenya Forest Service; (ii) the legality of the Claimants' licences; and (iii) the Claimants' compliance with Kenyan law.	The Claimants object to this DPR on the following grounds: <u>Documents within the possession, custody or control of the State</u> Here again the State has failed to state (as required by Article 3(c) of the IBA Rules) that the communications requested are not in the possession, custody or control of the State or make a statement explaining the reasons why it would be unreasonably burdensome for the State to produce such communications. The State is	The State confirms that it does not seek copies of any communications between the Claimants and the Kenya Forest Service. The State does, however, request copies of any other Documents which evidence communications between the Claimants and the Kenya Forest Service. The State replies to the Claimants' grounds of objection to this DPR on the following basis: <u>Documents within</u>	At issue is the questions whether the Claimants had the required consents from the Kenya Forest Service in respect of SPL 256 and SML 351. As noted above, the Claimants sought documents from the Respondent in respect of the Kenya Forest Service documents. The Respondent now seeks reciprocity. The Claimants are to produce the requested documents during the period 13 May 2007 (the date of the application for a prospecting right) to 5 August 2013 being the date of

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					<p>requesting communications between the Claimants and the State's own officials. By their very nature, these documents are self-evidently within the State's possession, custody or control (or, at the very least, ought to be). The Claimants should not be forced to take on the burden of searching for these documents, especially given they are not material to the outcome of the case.</p> <p><u>Materiality</u>²⁸</p> <p>The requested documents have</p>	<p><u>the possession, custody or control of the State</u></p> <p>The State does not agree that such Documents are, by their nature, "<i>self-evidently within the State's possession, custody or control</i>". For example, if the Claimants created their own notes of discussions with representatives of the Kenya Forest Service, then those Documents are not Documents which, by their very nature, ought to be in the State's possession, custody or control.</p>	<p>revocation.</p> <p>In terms of relevance, the Tribunal notes that the Claimants have already produced some correspondence with KFS (see exhibit C-211 to C-217).</p> <p>One of the Respondent's allegations is that government officials may have acted outside regular channels in dealing with the Claimants in permitting the Mrima project to proceed. Accordingly, it is not to be presumed that all relevant Kenya Forest Service</p>

²⁸ IBA Rules, Article 9(2)(a).

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					<p>some relevance to the three issues listed by the State. However, the requested documents are not material to the outcome of any issues in dispute. Specifically:</p> <p>Limb (i): the "Claimants' knowledge of the restrictions and requirements imposed by the Kenya Forest Service" cannot be determinative of any issue before the Tribunal. The State's Illegality Objection²⁹ is based on the contention that the Claimants will not</p>	<p>In addition, as part of this DPR, the State requested Documents evidencing communications between the Claimants <i>inter se</i> and/or PAW concerning communications between the Claimants and the Kenya Forest Service. Those Documents are also not, by their nature, Documents which ought to be in the State's possession, custody or control.</p> <p><u>Materiality</u></p> <p>The State notes that</p>	<p>documents would be in the possession of the Respondent (and of course communications among the Claimants or with PAW clearly would not be).</p> <p>DPR 5 is GRANTED in part.</p>

²⁹ Defined by the Claimants in the Claimants' Redfern at 3.9.2 as the State's contention that the "Tribunal has no jurisdiction *ratione materiae* over the Claimants' claims because the Claimants' investments do not comply with Kenyan law."

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					<p>have a protected investment if the State can prove any technical non-compliance with Kenyan law. The Claimants disagree, as neither the BIT nor the ICSID Convention contain a requirement of local-law compliance (nor do the cases relied upon by the State support the argument that non-compliance with Kenyan forestry law would deprive the Tribunal of jurisdiction or render the Claimants' claims inadmissible). But, even if (<i>arguendo</i>) compliance with Kenyan forestry law is material, the State has not explained how the Claimants'</p>	<p>the Claimants have not objected to this DPR on grounds of relevance. The State considers that the requested Documents are also sufficiently relevant and material to the outcome of the case.</p> <p><u>Limb (i)</u>: The State does not pursue this request on the basis of the Claimants' knowledge of the restrictions and requirements imposed by the Kenya Forest Service.</p> <p><u>Limbs (ii) and (iii)</u>: The State notes that the Claimants agree that the legality of the Claimants'</p>	

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					<p>knowledge of "<i>the restrictions and requirements imposed by the Kenya Forest Service</i>" could be material. On the State's Illegality Objection, what matters is that there were legal requirements and they were not met by the Claimants.</p> <p>Limbs (ii) and (iii): the Claimants acknowledge that the legality of the Claimants' licences and the Claimants' compliance with Kenyan law are matters relevant to the State's Illegality Objection. However, the requested documents cannot be material to either of</p>	<p>licences and the Claimants' compliance with Kenyan law are matters relevant to the State's jurisdiction objection. The Documents requested will help establish whether as a matter of fact, the Claimants had the required consents from the Kenya Forest Service. This issue is disputed (<i>see</i>, CWS-2 Anderson, paras 35-39 and State's Counter-Memorial, paras 80-81).</p> <p>The requested Documents are material to the dispute as to whether the</p>	

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					<p>these issues because they could neither establish that the Claimants' licences were issued illegally nor that the Claimants did not comply with Kenyan law.</p> <p>The State's reference to paragraphs 66 and 81 of the State's Counter-Memorial is revealing: those paragraphs make no allegation that the Claimants' licences were illegal or that the Claimants did not comply with Kenyan law. Rather, paragraph 66 states:</p> <p><i>"It follows that the allegations made by the Claimants about purported State interference in late</i></p>	<p>Claimants had any legitimate expectations in respect of SPL 256 and SML 351. For example, the State alleges that the Claimants "<u>knew when they procured the grant of SML 351 that they had not complied with the requirements under Kenyan law for the grant of a mining right</u>" (State's Counter-Memorial, para. 475) (emphasis added).</p> <p><u>Overly broad and unduly burdensome</u></p> <p>The State repeats its Reply to the Claimants' "<i>Overly broad and unduly burdensome</i>"</p>	

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					<p><i>2009 are entirely without merit. The reason why CMK was denied access to Mrima Hill by KFS officials was that CMK had no right to conduct any prospecting activities in the area. As Mr. Esau Omollo (Senior Deputy Director of KFS) observes, "[t]he reason CMK was not allowed into Mrima Hill at this time is that it was excluded from SPL 256. The KFS officers were correct to deny access to this protected area."</i></p> <p>This paragraph is the State's response to allegations by the Claimants that the KFS interfered with their investments. It</p>	<p>objection in DPR 3 above.</p> <p>The State does not agree that this DPR is overly broad. This request is narrow and specific, clearly identifying a specific subject matter - correspondence in relation to the Kenya Forest Service. Nonetheless, in the interests of cooperation, the State agrees to narrow its DPR to the date range 15 May 2007 (the date of the application for a prospecting right) to 5 August 2013.</p>	

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					<p>has nothing to do with the State's positive case and the requested documents could not be material to the Tribunal's evaluation of the legality of the Claimants' licences or their compliance with Kenyan law.</p> <p>Paragraph 81 asserts:</p> <p><i>"On 25 January 2010, the Ministry of Forestry and Wildlife (the Ministry with oversight of KFS) issued CMK with a consent to prospect within Mrima Hill forest. The consent was valid for one year and was subject to a number of conditions, notably that CMK was 'to restrict its sampling</i></p>		

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					<p><i>to the existing pits.' As Mr. Omollo notes '[n]o consent was ever issued by KFS allowing CMK to create new track or to excavate new pits.'"</i></p> <p>The requested documents could not be material to the Tribunal's evaluation of the legality of the Claimants' licences or their compliance with Kenyan law.</p> <p>Nevertheless, to the extent the State's factual allegation is relevant, the Claimants note that they have addressed that allegation in their Counter-Memorial on Preliminary</p>		

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					<p>Objections by producing relevant correspondence with the KFS (see Exhibits C-211 to C-217).</p> <p><u>Overly broad and unduly burdensome</u></p> <p>The Claimants consider that it is not reasonable for them to be burdened with searching for these documents, which are (i) manifestly not material and (ii) in the case of communications between the Claimants and the KFS, are self-evidently within the State's possession, custody or control (or, at the very least, ought to be).</p>		

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No.	Req. Party	Documents or Category of Documents Requested	Relevance and Materiality According to Requesting Party		Responses/ Objections to Document Request	Reply to Objections to Document Requests	Tribunal's Decision
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6.	R	Documents evidencing communications between the Claimants and Mr Ndung'u regarding Mr Ndung'u's engagement and/or the services Mr Ndung'u was to perform for the Claimants as agent, and communications between the Claimants <i>inter se</i> in relation thereto.	Claimants' Counter-Memorial, paragraph 68 CWS-1 Anderson, paragraphs 31 - 34 CWS-2 Anderson, paragraphs 17 - 21	The documents are relevant and material to the legality of SPL 256 and/or SML 351 and to the Claimants' compliance with Kenyan law.	The Claimants will produce such non-privileged documents that are responsive to this State DPR as are located following a reasonable and proportionate search. This is without prejudice to the Claimants' position that: (i) the issue of Mr Ndung'u's agency is not material to the outcome of the dispute; (ii) any alleged deficiency with regard to the grant of Prospecting Right No. 8258 could not affect the validity of SPL 256 or SML 351; and	The State notes the Claimants' agreement to produce while reserving its position in respect of the objections raised.	No order is made in relation to DPR 6.

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No.	Req. Party	Documents or Category of Documents Requested	Relevance and Materiality According to Requesting Party		Responses/ Objections to Document Request	Reply to Objections to Document Requests	Tribunal's Decision
			Reference to Submissions	Comments			
					(iii) compliance with Kenyan law is not a condition of the Tribunal's jurisdiction or the admissibility of the Claimants' claims (See Claimants' Counter-Memorial on Preliminary Objections, Section B).		
7.	R	Documents evidencing the services provided by Mr Ndung'u for and on behalf of the Claimants, including all " <i>contemporaneous evidence</i> " which evidences an agency relationship as alleged at paragraph 79 of the Claimants' Counter-Memorial, and communications between the Claimants <i>inter se</i> in relation thereto.	Claimants' Counter-Memorial, paragraph 79	The documents are relevant and material to the legality of SPL 256 and/or SML 351 and to the Claimants' compliance with Kenyan law.	This DPR is duplicative of State DPR 6. However, the Claimants will produce such non-privileged documents that are responsive to this State DPR as are located following a reasonable and proportionate search. This is without prejudice to the Claimants' position	The State notes the Claimants' agreement to produce and fully reserves its position in respect of the objections raised.	In light of the Claimants undertaking the Respondent withdraws its request for any order at this time. As this request is not pursued, no order is made.

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No.	Req. Party	Documents or Category of Documents Requested	Relevance and Materiality According to Requesting Party		Responses/ Objections to Document Request	Reply to Objections to Document Requests	Tribunal's Decision
			Reference to Submissions	Comments			
					<p>that:</p> <p>(i) the issue of Mr Ndung'u's agency is not material to the outcome of the dispute;</p> <p>(ii) any alleged deficiency with regard to the grant of Prospecting Right No. 8258 could not affect the validity of SPL 256 or SML 351; and</p> <p>(iii) compliance with Kenyan law is not a condition of the Tribunal's jurisdiction or the admissibility of the Claimants' claims (See Claimants' Counter-Memorial on Preliminary Objections, Section B).</p>		

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			Reference to Submissions	Comments			
8.	R	Documents evidencing communications between the Claimants and Mr Ndung'u in relation to the termination of Mr Ndung'u's services, and communications <i>inter se</i> in relation thereto.	Claimants' Counter-Memorial, paragraph 23	The documents are relevant and material to the legality of SPL 256 and/or SML 351 and to the Claimants' compliance with Kenyan law.	<p>The Claimants object to this DPR on the following grounds:</p> <p><u>Relevance</u>³⁰</p> <p>The State makes no attempt to explain how the requested documents are relevant to "<i>the legality of SPL 256 and/or SML 351 and to the Claimants' compliance with Kenyan law.</i>"</p> <p>The State has failed to reference any relevant submission in support of this DPR. The part of the Claimants' Counter-Memorial that the State refers to (paragraph 23) is</p>	The State notes the Claimants' objections to this DPR. The State fully reserves its position in respect of those objections but, in the interests of cooperation, confirms that it does not intend to pursue this DPR.	<p>The Claimant has indicated it does not intend to pursue DPR 8 at this time.</p> <p>As this request is not pursued at this stage, no order is made.</p>

³⁰ IBA Rules, Article 9(2)(a).

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					<p>completely off-point – it reads as follows: <i>"The case of Saba Fakes v Turkey is instructive in this regard. In that case, the applicable BIT contained a scoping provision, under which the treaty applies to 'investments [...] established in accordance with the laws and regulations [of the host State].'</i> <i>Relying on this provision of the BIT, Turkey argued that if an investment is made in breach of any of the host State's laws in any way, such breach would 'taint' the investment and deprive it of the protection under the</i></p>		

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					<p><i>BIT and the ICSID Convention. In rejecting this argument, the tribunal took account of the object and purpose of the BIT:</i></p> <p><i>'[t]he Tribunal [...] considers that it would run counter to the object and purpose of investment protection treaties to deny substantive protection to those investments that would violate domestic laws that are unrelated to the very nature of investment regulation. In the event that an investor breaches a requirement of domestic law, a host State can take</i></p>		

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					<p><i>appropriate action against such investor within the framework of its domestic legislation. However, unless specifically stated in the investment treaty under consideration, a host State should not be in a position to rely on its domestic legislation beyond the sphere of investment regime to escape its international undertakings vis-à-vis investments made in its territory'."</i></p> <p>Obviously, this section of the Claimants' submissions has zero relevance to the documents requested by the State (and, indeed, it is clearly</p>		

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					<p>unhelpful to the State).</p> <p><u>Materiality</u>³¹</p> <p>The State has not attempted to explain how documents relating to the "termination of Mr Ndung'u's services" could be material to "the legality of SPL 256 and/or SML 351 and to the Claimants' compliance with Kenyan law", let alone the outcome of the case. For their part, the Claimants cannot understand how such documents could possibly be material.</p>		

³¹ IBA Rules, Article 9(2)(a).

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No.	Req. Party	Documents or Category of Documents Requested	Relevance and Materiality According to Requesting Party		Responses/ Objections to Document Request	Reply to Objections to Document Requests	Tribunal's Decision
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9.	R	Documents evidencing internal communications between the Claimants <i>inter se</i> and between the Claimants and third parties in relation to the meetings of the Prospecting and Mining Licensing Committee.	Claimants' Counter Memorial, paragraph 92	The documents are relevant and material to demonstrating the Claimants' knowledge of and compliance with Kenyan law.	The Claimants do not accept that their " <i>knowledge of</i> " Kenyan law is relevant or material, or that compliance with Kenyan law is a condition of the Tribunal's jurisdiction or the admissibility of the Claimants' claims (See Claimants' Counter-Memorial on Preliminary Objections, Section B) or a material issue generally. However, in the interests of cooperation, the Claimants will produce such non-privileged documents that are responsive to the State's request as are	The State notes the Claimants' agreement to produce and fully reserves its position in respect of the objections raised.	In light of the Respondent's undertaking the Claimants have withdrawn DPR 9 at this stage. As this request is not pursued at this stage, no order is made.

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					located following a reasonable and proportionate search.		
10.	R	Documents evidencing communications between the Claimants and the Ministry of Mining in relation to the Mining Investment Roadmap (Exhibit C-61) and between the Claimants <i>inter se</i> and/or PAW in relation thereto.	Claimants' Memorial, paragraph 63 Claimants' Counter-Memorial, paragraph 37 CWS-2 Anderson, paragraph 80 Exhibit C-61	The documents are relevant and material to demonstrating the Claimants' knowledge of and compliance with Kenyan law, and the status of the Mining Investment Roadmap.	The Claimants object to this DPR on the following grounds: <u>Documents within the possession, custody or control of the State</u> Here again the State has failed to state (as required by Article 3(c) of the IBA Rules) that the communications requested are not in the possession, custody or control of the State or make a statement explaining the reasons why it would be unreasonably burdensome for the State to produce such	The State confirms that it does not seek copies of any communications between the Claimants and the Ministry of Mining. The State does, however, request copies of any other Documents which evidence communications between the Claimants and the Ministry of Mining. The State replies to the Claimants' grounds of objection to this DPR on the	The Tribunal declines to grant an Order in relation to DPR 10. Although the Respondent's Mining Investment Roadmap (Exhibit C-61) is an important document, the request for documents "between the Claimants' <i>inter se</i> and/or PAW in relation to the Mining Investment Roadmap" is too broad, burdensome, and lacks probative value. DPR 10 is REJECTED.

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					<p>communications.</p> <p>The State is requesting communications between the Claimants and the State's own officials. By their very nature, these documents are self-evidently within the State's possession, custody or control (or, at the very least, ought to be). The Claimants should not be forced to take on the burden of searching for these documents, especially given they are not material to the outcome of the case.</p> <p>Insofar as the State's request relates to communication between the</p>	<p>following basis:</p> <p><u>Documents within the possession, custody or control of the State</u></p> <p>The State does not agree that such Documents are, by their nature, "<i>self-evidently within the State's possession, custody or control</i>". For example, if the Claimants created their own notes of discussions with representatives of the Ministry of Mining, then those Documents are not Documents, which by their nature, ought to be in the State's possession, custody or control.</p> <p>In addition, as part of this DPR, the</p>	

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					<p>Claimants, the Claimants object on the following grounds:</p> <p><u>Materiality</u>³²</p> <p>The Claimants do not accept that their "knowledge of" Kenyan law is relevant or material, or that compliance with Kenyan law is a condition of the Tribunal's jurisdiction or the admissibility of the Claimants' claims (See Claimants' Counter-Memorial on Preliminary Objections, Section B) or a material issue generally.</p> <p>The requested</p>	<p>State requested Documents evidencing communications between the Claimants <i>inter se</i> and/or PAW concerning communications between the Claimants and the Ministry of Mining. Those Documents are also not, by their nature, Documents which ought to be in the State's possession, custody or control.</p> <p><u>Materiality</u></p> <p>The State notes that the Claimants have not objected to this DPR on grounds of</p>	

³² IBA Rules, Article 9(2)(a).

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					<p>documents may have some relevance to the issues listed by the State, but they are not material to the outcome of any issues in dispute. Specifically, the status of the Mining Investment Roadmap under Kenyan law could never be determined by internal communications between the Claimants.</p> <p>Further, the State has not referred to its own case in its attempt to justify this DPR, and has not explained how the requested documents could help or harm either side's case.</p> <p><u>Burden of proof</u></p>	<p>relevance.</p> <p>The requested Documents are also material to the dispute as to whether the Claimants had any legitimate expectations in respect of SPL 256 and SML 351. For example, the State alleges that the Claimants "<i>knew when they procured the grant of SML 351 that they had not complied with the requirements under Kenyan law for the grant of a mining right</i>" (State's Counter-Memorial, para. 475) (emphasis added).</p> <p>The Claimants have</p>	

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					<p>The Claimants' reliance upon the Mining Investment Roadmap and the State's conduct in providing the Claimants with a copy of the Roadmap is an issue in the Claimants' claim and the Claimants' arguments relating to estoppel, preclusion and acquiescence – see Claimants' DPR 20 in this regard. As such, the Claimants have the burden of proof in relation on these matters.</p> <p>The burden of proof is an important touchstone in document production. As Bernard Hanotiau has put it:</p>	<p>pleaded that they were provided with a copy of the Mining Investment Roadmap which "<i>set out the steps for obtaining a mining licence</i>" (Claimants' Memorial, para. 63) and the Claimants "<i>resolved to follow it strictly</i>" (CWS-1 Anderson, para. 85). However, the Claimants take a different position in their Counter-Memorial where they seek to downplay the status of the Mining Investment Roadmap by merely referring to the "<i>supposedly 'mandatory legal requirements' set</i></p>	

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					<p><i>"when a party alleges that its opponent has failed to prove a submission it has made and requests that party to produce the relevant evidence, this request should in most cases be dismissed".³³</i></p> <p>According to Nathan O'Malley:</p> <p><i>"where a party brings a document production request on the grounds that the adverse party has not provided those documents necessary to support its case, such a request</i></p>	<p><i>out in the Mining Investment Roadmap"</i> (Claimants' Counter-Memorial, para. 37; <i>see, also, CWS-2 Anderson, para. 80).</i></p> <p>Consequently, the requested Documents are material to the outcome of the dispute as they will shed light on the extent to which the Claimants acted in a manner that was consistent with the State's position (and Mr Anderson's original position) that the Mining Investment</p>	

³³ B. Hanotiau, *Document Production in International Arbitration – 2006 Special Supplement* (ICC International Court of Arbitration Bulletin).

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					<p><i>should generally be denied</i>.³⁴</p> <p>Thus, if the Claimants do not produce sufficient evidence to support their cases as it relates to the Mining Investment Roadmap, the State's remedy is not to make a document production request but rather to make the submission that the Claimants have not proven the relevant points. This is consistent with procedural economy.</p>	<p>Roadmap contained "a detailed overview of the legal requirements" for attaining a mining licence (State's Counter-Memorial, para. 215), and therefore elucidate the status of the Mining Investment Handbook in the minds of the Claimants. This is material to the outcome of the Claimants' claim for breach of legitimate expectations.</p> <p><u>Burden of proof</u></p> <p>The State does not generally deny that</p>	

³⁴ N. D. O'Malley, *Rules of Evidence in International Arbitration – An Annotated Guide* (Informa, 2012), pp 56-57

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						<p>the Claimants have the burden of proof in respect of issues in the Claimants' claim. However, the State does dispute the Claimants' overarching reliance on the notion of burden of proof as an <i>"important touchstone in document production."</i></p> <p>As acknowledged by Dr Reto Marghitola:</p> <p><i>"Neither the 1999 IBA Rules nor the current 2010 IBA Rules mention the burden of proof...the silence of the IBA Rules may be interpreted</i></p>	

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						<p><i>as meaning that it is not a requirement under the IBA Rules that the requesting party bears the burden of proof on a matter to be proved by the requested documents.</i>"³⁵</p> <p>Further, the burden of proof in document production is not applied as a "blanket rule"³⁶ and requested documents are:</p> <p><i>"not only material to the outcome of the dispute if it helps the</i></p>	

³⁵ R. Marghitola, *Document Production in International Arbitration* (Kluwer, 2015), pp. 54-55.

³⁶ J. Waincymer, *Procedure and Evidence in International Arbitration*, (Kluwer, 2012), p. 860.

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						<p><i>requesting party discharge the burden of proof. It is also material if it prevents the requested party proving a fact. In both cases, the requested document may influence the outcome of the dispute.</i>³⁷</p> <p>The role of document production in investment treaty arbitration, and this case specifically, is to facilitate the parties to obtain, and rely on, documentary evidence that would otherwise be</p>	

³⁷ R. Marghitola, *Document Production in International Arbitration* (Kluwer, 2015), p. 55.

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						<p>exclusively in the other party's control. The State has:</p> <p><i>"a right to investigate outside of what is in its custody in order to establish the truth of its case.</i></p> <p>[...]</p> <p><i>The duty for a claimant to bear the burden of proof...[does] not defeat this right to obtain disclosure of narrowly and specifically described information or documents."</i>³⁸</p>	

³⁸ J. El-Ahdab and A. Bouchenaki, "Discovery in International Arbitration: A Foreign Creature for Civil Lawyers?" in A. van den Berg, *Arbitration Advocacy in Changing Times*, ICCA Congress Series (Kluwer, 2011), Vol 15, pp. 78-79 and 87-88.

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						Therefore, it is not inconsistent with procedural economy for the State to request Documents that are outside of its possession, custody or control in order to establish the true facts of the case which will inform the Tribunal's assessment of the respective position taken by each party.	
11.	R	Documents evidencing communications between the Claimants and local community representatives in relation to local community approval and/or dissent in	Claimants' Memorial, paragraph 75 CWS-1 Anderson, paragraph 131 See letters from the local community dated 15	The documents are relevant and material to the Claimants' allegation that the Mrima Hill project had the support of the local community.	The Claimants object to this DPR on the following grounds: <u>Materiality</u> ³⁹ The letters referred to at CWS-1	The State replies to the Claimants' grounds of objection to this DPR on the following basis:	The Tribunal has already declined to order production of documents in relation to the MSHSG. For lack of materiality and

³⁹ IBA Rules, Article 9(2)(a).

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		respect of the Mrima Hill project and communications between the Claimants <i>inter se</i> and/or PAW in relation thereto.	October 2012, Exhibits C-89 and C-90		Anderson, paragraph 131 and produced as Exhibits C-89 and C-90 were produced by the Claimants in support of their contention that the local community approved of the Claimants' activities at Mrima Hill. The State disputes this contention in its Counter-Memorial (e.g. paragraph 92). ⁴⁰ The requested documents are therefore <i>prima facie</i> relevant to this disputed contention. However, the State has not explained how the disputed	<u>Materiality</u> The State notes that the Claimants accept that the requested Documents are <i>prima facie</i> relevant to the disputed issue of whether or not the local community approved of the Claimants' activities at Mrima Hill. The requested Documents are also material to the outcome of the case in respect of both jurisdictional and merits arguments.	relevance. DPR 11 is also REJECTED.

⁴⁰ The State has not explained how the requested documents and the issue of whether "*the Mrima Hill project had the support of the local community*" are relevant to either side's case. The paragraph of the Claimants' Memorial referred to by the State makes no reference to local community approval or dissent regarding the Claimant's investments in Mrima Hill. Rather the Claimants' refer in that paragraph to the Kwale County Council consent dated 16 May 2007 that was produced as exhibit C-32.

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					<p>factual contention is material to either side's substantive case. The State cannot cross the materiality threshold on this DPR because the requested documents plainly do not go to a factual issue from which a legal conclusion affecting the outcome of the dispute could be drawn.</p> <p><u>Overly broad and unduly burdensome</u></p> <p>The State's request is obtuse and unlimited in temporal terms. Given the breadth of this DPR and the fact that the requested documents are clearly not material, the Claimants do not</p>	<p>The role of the local Kaya elders and their observations on the Mrima Hill project are relevant to the wider issue of the Claimants' conduct in procuring the purported mining licence and to testing the Claimants' contention that there was extensive local community support (<i>see</i>, CWS-1 Anderson, para. 131) for the project. It is also relevant to the question of whether the true investors are the Claimants or PAW.</p> <p>Further, while the State has not made any specific allegation</p>	

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					think it would be reasonable to burden them with the obligation to search for these documents.	regarding the engagement with the local community, the State does contend that the Claimants' investments have not been procured in accordance with Kenyan law and/or tainted by corruption and is entitled to understand the full factual circumstances surrounding, and leading up to, the Claimants' procurement of their alleged licences (<i>see</i> , State's Counter-Memorial, Section V, subsection C3). <u>Overly broad and unduly burdensome</u>	

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						<p>The State disputes the Claimants' allegation that this DPR is overly broad and unduly burdensome. This request is narrow and specific, clearly identifying (i) a specific subject matter - local community approval of the Mrima Hill project, and (ii) the recipients of the communications.</p> <p>Nonetheless, the State agrees to narrow its DPR to the date range of 11 January 2012 (the date of the application for a mining licence) to 5 August 2013 (the date of the alleged revocation of SML</p>	

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						351).	
12.	R	A copy of the cadastral survey and evidence that the same was approved by the Respondent.	CWS-1 Anderson, paragraph 87 CWS-2 Anderson, paragraph 82 Exhibit C-62	These documents are relevant and material to determining the extent to which the Claimants complied with Kenyan law in the procurement of SML 351. The Claimants' reliance on the cadastral survey is unsupported by evidence. Exhibit C-62 is provided, however this is merely the " <i>letter accompanying the lodgement of the cadastral survey at the Department of Mines and Geology</i> ", which does not amount to proof of the lodgement of the cadastral survey, evidence that the cadastral survey was undertaken, nor proof of approval of the cadastral survey.	The Claimants object to the State's request on the following grounds: <u>Documents within the possession, custody or control of the State</u> This document is clearly within the State's custody, possession or control. Exhibit C-62 is stamped " <i>Received</i> " by the office of the Commissioner of Mines and Geology on 15 February 2013. This evidences the fact that the cadastral survey was appropriately lodged with the State by CMK.	The State replies to the Claimants' grounds of objection to this DPR on the following basis: <u>Documents within the possession, custody or control of the State</u> Article 3(c)(i) of the IBA Rules requires a " <i>statement that the Documents requested are not in the possession, custody or control of the requesting party.</i> " Provision is not made in the IBA Rules for Documents that "ought" to be within the State's	The Respondent advises that it "has conducted and continues to conduct searches for these requested documents" but despite "best efforts" no such documents have been found. The Respondent disputes receipt and approval of the cadastral survey. If the Claimants possess such documentary evidence it is to be produced. DPR 12 is GRANTED.

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					<p>Regarding the State's comment in relation to this DPR that the State is continuing to search for the requested document, the Claimants repeat their objection that the State has failed to make the statement required by Article 3(c) of the IBA Rules.</p> <p><u>Relevance</u>⁴¹</p> <p>The submission and approval of the cadastral survey is not a factual issue in dispute. This is clear from the State's failure to refer to the pleadings of either</p>	<p>possession, custody or control, as the Claimants appear to suggest.</p> <p>Tribunals have held that:</p> <p><i>"for a party to claim that documents are not in its control, it must have made 'best efforts' to obtain documents..."</i>⁴³</p> <p>In accordance with this approach, the State has conducted and continues to conduct searches for these requested Documents. As at the date of the</p>	

⁴¹ IBA Rules, Article 9(2)(a).

⁴³ *William Ralph Clayton et al. v Government of Canada*, NAFTA, UNCITRAL, Procedural Order No. 8, 25 November 2009, para 1(h).

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No.	Req. Party	Documents or Category of Documents Requested	Relevance and Materiality According to Requesting Party		Responses/ Objections to Document Request	Reply to Objections to Document Requests	Tribunal's Decision
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					<p>side.</p> <p>While the Claimants refer to the cadastral survey in their witness evidence, the State has not alleged that the Claimants did not lodge the cadastral survey or that it was not approved by the State. The requested documents are, therefore, irrelevant.</p> <p><u>Materiality</u>⁴²</p> <p>The State has not demonstrated relevance and so <i>a fortiori</i> the State cannot cross the materiality threshold on this DPR.</p> <p>For the avoidance of</p>	<p>filing of these Replies (6 April 2017), the State confirms that it has made and continues to make its "best efforts" to locate the requested Documents but no such Documents have been found to be in its possession, custody or control (save for those documents which are already on the record in these proceedings and/or in the judicial review proceedings).</p> <p><u>Relevance</u></p> <p>The requested Documents are</p>	

⁴² IBA Rules, Article 9(2)(a).

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No.	Req. Party	Documents or Category of Documents Requested	Relevance and Materiality According to Requesting Party		Responses/ Objections to Document Request	Reply to Objections to Document Requests	Tribunal's Decision
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					<p>doubt, the Claimants do not accept that compliance with Kenyan law is a condition of the Tribunal's jurisdiction or the admissibility of the Claimants' claims (See Claimants' Counter-Memorial on Preliminary Objections, Section B) or a material issue generally.</p> <p><u>Burden of proof</u></p> <p>In its attempted justification of this DPR, the State itself acknowledges that it is for the Claimants to prove their case on the reliance on the cadastral survey. The Claimants recall the remarks of Bernard Hanotiau and Nathan</p>	<p>relevant to determining the Claimants' compliance with Kenyan law in their application for, and the grant of, SML 351.</p> <p>The approval of a "cadastral survey of the Deposit area" (Exhibit C-62) is one of the legal requirements for the grant of a mining licence, and as the State has confirmed that these Documents are not within its possession, custody or control, the withholding of these Documents by the Claimants has the result that the State is unable to fully plead its</p>	

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					<p>O'Malley (extracted in the Claimants' response to DPR 10 above). The State should not be able to request documents on the basis that they are necessary for the Claimants to prove their case. If that is the basis for this request, the State's remedy is submission, not document production.</p>	<p>case on this element of the merits. Therefore, contrary to the Claimants' assertion, the requested Documents are relevant to the outcome of the case.</p> <p><u>Materiality</u></p> <p>The State has demonstrated the relevance of the requested Documents to the outcome of the case and, therefore, the State's comments that the State cannot cross the "materiality threshold" are unfounded.</p> <p>The requested Documents are</p>	

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						<p>clearly material to the outcome of the case as they relate to the issue of whether the Claimants held a valid investment in SML 351 and whether they complied with Kenyan law in the grant of SML 351.</p> <p><u>Burden of proof</u></p> <p>The acknowledgment by the State that "<i>it is for the Claimants to prove their case on the reliance on the cadastral survey</i>" does not operate to preclude the State from being able to request Documents on that issue. In addition to these</p>	

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No.	Req. Party	Documents or Category of Documents Requested	Relevance and Materiality According to Requesting Party		Responses/ Objections to Document Request	Reply to Objections to Document Requests	Tribunal's Decision
			Reference to Submissions	Comments			
						<p>Documents being necessary for the Claimants to prove their case, these Documents are necessary to allow the State to also fully plead to the validity of SML 351 under Kenyan law and to disprove the Claimants' assertion that SML 351 was granted in accordance with Kenyan law.</p> <p>Furthermore, the State repeats its Reply to the Claimants' "<i>Burden of proof</i>" objection in DPR 10 above.</p> <p>Finally, it is noted that the Claimants advance no objection on the grounds of the</p>	

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			Reference to Submissions	Comments			
						request being unduly burdensome, which, given its narrow scope, it plainly is not.	
13.	R	Board minutes of the Claimants relating to their purported investment in Kenya and all matters in relation to that investment.	Claimants' Memorial, paragraphs 37 and 39 Claimants' Counter-Memorial, paragraph 250	The documents are relevant and material to, <i>inter alia</i> : (i) the Claimants' knowledge of the legality of SPL 256 and/or SML 351; (ii) the Claimants' knowledge of progress made at Mrima Hill; (iii) the Claimants' knowledge of compliance with Kenyan law; and (iv) the Claimants' knowledge of the viability of the Mrima Hill project and the proposed duration of their investment.	The Claimants object to this DPR on the following grounds: <u>Overly broad and unduly burdensome</u> The State's DPR is unreasonably broad. It contains no date range limitation and fails to sufficiently specify the subject matter of the documents requested. Rather, the State seeks minutes relating to " <u>all matters</u> " (underline added) related to the Claimants'	The State replies to the Claimants' grounds of objection to this DPR on the following basis: <u>Overly broad and unduly burdensome</u> The State disputes the Claimants' contention that this DPR is unreasonably broad. The State's request is sufficiently specific, clearly identifying (i) a specific subject matter - the	To the extent there are entries in the Board Minutes of the Claimants related to the Mrima investment including but not limited to references to potential non-compliance with Kenya law, such extracts are to be produced. The relevant time period for production is 1 January 2007 until the date of delivery of the Notice of Arbitration being 7 June 2015. DPR 13 is

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			Reference to Submissions	Comments			
					<p>investments.</p> <p><u>Relevance</u>⁴⁴</p> <p>The State attempts to justify this DPR by saying that these documents are relevant to the Claimants' "knowledge" of a wide range of matters. The Claimants do not accept that their "knowledge of" any of the matters referred to by the State is relevant. The State has not pointed to any part of its pleadings where it puts the "Claimants' knowledge of the legality of SPL 256 and/or SML 351"</p>	<p>Claimants' purported investment in respect of Mrima Hill, and (ii) the class of Document, "board minutes".</p> <p>Nonetheless, the State agrees to narrow its DPR to the date range of 1 January 2007 to date.</p> <p><u>Relevance</u></p> <p>The requested Documents are relevant to the outcome of the case, as they are fundamental to the Claimants' case on legitimate expectations, and the State's defence</p>	GRANTED in part.

⁴⁴ IBA Rules, Article 9(2)(a).

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No.	Req. Party	Documents or Category of Documents Requested	Relevance and Materiality According to Requesting Party		Responses/ Objections to Document Request	Reply to Objections to Document Requests	Tribunal's Decision
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					<p>into issue; similarly, the Claimants are not aware of the State making any allegation regarding the Claimants' knowledge of "<i>progress made at Mrima Hill</i>".</p> <p>The only aspect of the Claimants' case where the Claimants' knowledge or state of mind is relevant is legitimate expectations and that, like the rest of the claims the Claimants make, is for the Claimants to prove.</p> <p><u>Materiality</u>⁴⁵</p> <p>This DPR is premised on the</p>	<p>on legitimate expectations.</p> <p>In particular, Documents that evidence the Claimants' knowledge of Kenyan law are highly relevant to "<i>an assessment of the particular factual context</i>" that is required to determine whether the Claimants had legitimate expectations, and in particular whether the "<i>Claimants knew - but failed to comply with - the requirements for the grant of a mining lease under Kenyan law</i>"</p>	

⁴⁵ IBA Rules, Article 9(2)(a).

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No.	Req. Party	Documents or Category of Documents Requested	Relevance and Materiality According to Requesting Party		Responses/ Objections to Document Request	Reply to Objections to Document Requests	Tribunal's Decision
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					<p>contention that the Claimants "<i>knowledge</i>" of the matters listed by the State is relevant. The Claimants disagree but, even if (<i>arguendo</i>) the Claimants' knowledge or state of mind on these matters was relevant, it would certainly not be material to the outcome of the case.</p> <p><u>Burden of proof</u></p> <p>The State refers only to the Claimants' case in making this DPR. To the extent this DPR relates solely to the Claimants' burden of proof, the Claimants' recall the remarks of Bernard Hanotiau and Nathan O'Malley</p>	<p>(State's Counter-Memorial, para. 461).</p> <p>Furthermore, while the Claimants' case is for them to prove, the State is entitled in these proceedings to disprove the Claimants' allegations and is therefore entitled to request Documents which will assist it in doing so.</p> <p><u>Materiality</u></p> <p>Further, the requested Documents are also material to the dispute as to whether the Claimants had any legitimate expectations in respect of SPL 256</p>	

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					(extracted in the Claimants' response to DPR 10 above) and repeat that the State should not be able to request documents on the basis that they are necessary for the Claimants to prove their case. If that is the basis for this request, the State's remedy is submission, not document production.	and SML 351. For example, the State alleges that the Claimants " <i>knew when they procured the grant of SML 351 that they had not complied with the requirements under Kenyan law for the grant of a mining right</i> " (State's Counter-Memorial, para. 475) (emphasis added) and these Documents are material to this allegation and to the State's ability to disprove the Claimants' case on legitimate expectations. <u>Burden of proof</u> The State repeats its Reply to the	

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						Claimants' " <i>Burden of proof</i> " objection in DPR 10 above.	
14.	R	Documents evidencing communications between the Claimants <i>inter se</i> and/or PAW in relation to due diligence on Mr Juma's character and business dealings, including but not limited to any analysis undertaken for anti-money laundering requirements (if any).	CWS-2 Townsend, paragraph 17	The documents are relevant and material to understanding the Claimants' knowledge of Mr Juma's character and business dealings prior to entering into the agreement with Mr Juma dated 7 March 2013 (Exhibit C-179). The documents are also relevant and material to the assessment made by the Claimants as to the risks of corruption and the legality of the course of action that was being proposed by Mr Juma	The Claimants will produce such non-privileged documents that are responsive to the State's request for documents " <i>evidencing communications between the Claimants inter se and/or PAW in relation to due diligence on Mr Juma's character and business dealings</i> ". The Claimants object, however, to the portion of this DPR that seeks documents concerning " <i>anti-money laundering</i>	The State notes the Claimants' agreement to produce and fully reserves its position in respect of the objections raised. The State however does not agree with the Claimants' refusal to produce Documents that concern " <i>anti-money laundering requirements</i> ". In the usual course of due diligence, anti-money laundering requirements are a key factor and given that " <i>one of PAW's lawyers</i> " (CWS-2 Townsend, para. 17) undertook	In light of the Claimant's undertaking, the Respondent withdraws its request. As this request is not pursued, no order is made.

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No.	Req. Party	Documents or Category of Documents Requested	Relevance and Materiality According to Requesting Party		Responses/ Objections to Document Request	Reply to Objections to Document Requests	Tribunal's Decision
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					<p><i>requirements". The State has not made any allegation of money laundering, and the part of Mr Townsend's second witness statement to which the State refers (paragraph 17) does not say anything about this new topic. This portion of the State's request therefore fails to satisfy the requirement of relevance (and the requirement of materiality).</i></p>	<p>the due diligence on Jacob Juma it would be expected that anti-money laundering checks would have been conducted. The issue of anti-money laundering goes to Mr Juma's character, business dealings and the source of his funds. In this regard, the State notes that the Claimants agreed in the Memorandum of Understanding dated 7 March 2013 (Exhibit C-179) to receive substantial sums from Mr Juma and/or Pwani Mining Limited just one week after Mr Juma first made contact with them.</p>	

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						<p>It is to be expected that the Claimants carried out anti-money laundering checks before entering into that agreement. The Claimants have accepted that Mr Juma's character and business dealings are relevant and material to the outcome of the case by agreeing to produce responsive Documents and it is submitted that they should also produce Documents evidencing any analysis undertaken for anti-money laundering requirements.</p>	

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No.	Req. Party	Documents or Category of Documents Requested	Relevance and Materiality According to Requesting Party		Responses/ Objections to Document Request	Reply to Objections to Document Requests	Tribunal's Decision
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15.	R	Documents evidencing communications between the Claimants <i>inter se</i> and/or PAW (including but not limited to Mr O'Sullivan's response to and/or any email chain related to Mr Anderson's email dated 28 February 2013 at Exhibit C-74) in relation to Mr Juma's engagement, including but not limited to, the substance and meaning of Mr Juma's offer to help the Claimants overcome the " <i>bureaucratic process</i> " of applying for a mining licence (CWS-1 Anderson, para 102).	Claimants' Memorial, paragraph 71 CWS-1 Anderson, paragraphs 102 and 103 Exhibit C-74 Respondent's Counter-Memorial, paragraph 266	The documents are relevant and material to: (i) understanding the Claimants' knowledge of Mr Juma's character and business dealings prior to entering into the agreement with Mr Juma dated 7 March 2013 (Exhibit C-179); and (ii) the assessment made by the Claimants as to the risks of corruption and the legality of the course of action that was being proposed by Mr Juma.	This DPR is objectionable for its lack of a specified temporal scope but, in the interests of cooperation, the Claimants will produce responsive (non-privileged) documents that were created or received during the period from the date Mr Juma first approached the Claimants (28 February 2013) to the date on which SML 351 was revoked (5 August 2013). The Claimants trust that this temporal scope is acceptable to the State, as the proposed period covers the	The State notes the Claimants' agreement to produce and fully reserves its position in respect of the objections raised. However, the date range proposed by the Claimants is not acceptable to the State. The State proposes that Documents should be produced by the Claimants from 28 February 2013 (being the date Mr Juma first approached the Claimants) to date. As Mr Juma was not put forward as a witness by the Claimants in these proceedings (although they had	In light of the Claimant's undertaking, the Respondent withdraws DPR 15. However, in relation to the claimants' challenge to dates, the Tribunal agrees that the relevant time period in respect of DPR 15 is 28 February 2013 (being the date Mr. Juma first approached the Claimant) and ending on the date of Mr. Juma's death on 5 May 2016 As this request is not pursued at this stage, no order is made.

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No.	Req. Party	Documents or Category of Documents Requested	Relevance and Materiality According to Requesting Party		Responses/ Objections to Document Request	Reply to Objections to Document Requests	Tribunal's Decision
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					allegations that the State makes, namely that Mr Juma "procured" SML 351 by corrupt means and that he did not provide any legitimate services to the Claimants (i.e. the State's allegation there were "insufficient bona fide business reasons" for the Claimants relationship with Mr Juma –see paragraph 273.8 of the State's Memorial ").	the opportunity to do so by filing a witness statement together with their Memorial which was served before Mr Juma's death), it is critical to understand from documentary evidence his role in relation to the Claimants and their investments, which extends beyond the date on which SML 351 was suspended. As the Tribunal will not have the benefit of any testimony from Mr Juma, the communications relating to his services are particularly key to establishing Mr Juma's role in the	

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			Reference to Submissions	Comments			
						<p>procurement of SML 351 and what was meant by paragraph 5 of the Memorandum of Understanding dated 7 March 2013 (Exhibit C-179) which reads "<i>JJ will personally hold the licence granted to CMK...</i>".</p> <p>Documents created after the alleged revocation of SML 351 on 5 August 2013 will also evidence the nature of the services provided by Mr Juma and the nature of Mr Juma's relationships with State officials.</p>	
16.	R	Documents evidencing the services carried out by Mr	Claimants' Counter-Memorial, paragraphs	The documents are relevant and material to the	This DPR is objectionable for its	The State notes the Claimants'	The Tribunal notes the Claimants'

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No.	Req. Party	Documents or Category of Documents Requested	Relevance and Materiality According to Requesting Party		Responses/ Objections to Document Request	Reply to Objections to Document Requests	Tribunal's Decision
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		Juma for or on behalf of the Claimants including communications between the Claimants <i>inter se</i> and/or with PAW in relation thereto.	200(c) and 272	assessment made by the Claimants as to the risks of corruption and the legality of the course of action that was undertaken by the Claimants and/or Mr Juma in the procurement of SML 351 and related consents.	lack of a specified temporal scope. For reasons explained in response to DPR 15 above, the Claimants will produce responsive (non-privileged) documents that were created or received during the period from the date Mr Juma first approached the Claimants (28 February 2013) to the date on which SML 351 was revoked (5 August 2013).	agreement to produce. However, the date range proposed by the Claimants is not acceptable to the State for the reasons explained at DPR 15 above. The State proposes that Documents should be produced by the Claimants from 28 February 2013 (being the date Mr Juma first approached the Claimants) to date.	undertaking and rules that the relevant time period in respect of DPR 15 is 28 February 2013 (being the date Mr. Juma first approached the Claimant) and ending on the date of Mr. Juma's death on 5 May 2016. DPR 16 is GRANTED in part.
17.	R	Documents evidencing communications between the Claimants and Jacob Juma in relation to: (i) the procurement of SML 351 and related consents; and (ii) Mr Juma's	Claimants' Memorial, paragraph 71 Claimants' Counter-Memorial, paragraph 250 Exhibit C-179	The documents are relevant and material to understanding: (i) the reasons for the Claimants' decision to enter into the agreement with Mr Juma dated 7 March 2013	This DPR is objectionable for its lack of a specified temporal scope. For reasons explained in response to DPR 15 above, the Claimants	The State notes the Claimants' agreement to produce. However, the date range proposed by the Claimants is not	The Tribunal notes the Claimants' undertaking and agrees that the relevant time period in respect of DPR 15 is 28 February 2013

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No.	Req. Party	Documents or Category of Documents Requested	Relevance and Materiality According to Requesting Party		Responses/ Objections to Document Request	Reply to Objections to Document Requests	Tribunal's Decision
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		participation in PAW.		(Exhibit C-179); and (ii) the legality of the course of action that was undertaken by the Claimants and/or Mr Juma in the procurement of SML 351 and related consents.	will produce responsive (non-privileged) documents that were created or received during the period from the date Mr Juma first approached the Claimants (28 February 2013) to the date on which SML 351 was revoked (5 August 2013).	acceptable to the State for the reasons explained at DPR 15 above. The State proposes that Documents should be produced by the Claimants from 28 February 2016 (being the date Mr Juma first approached the Claimants) to 5 May 2016 (the date of Mr Juma's death).	(being the date Mr. Juma first approached the Claimant) and ending on the date of Mr. Juma's death on 5 May 2016. DPR 17 is GRANTED in part.
18.	R	Documents evidencing communications between the Claimants <i>inter se</i> and/or with PAW which consider the meaning and effect of the terms of the agreement with Mr Juma dated 7 March 2013 (Exhibit C-179).	Exhibit C-179	The documents are relevant and material to understanding: (i) the reasons for the Claimants' decision to enter into the agreement with Mr Juma dated 7 March 2013 (Exhibit C-179); and (ii) the legality of the course of action that was undertaken by the Claimants and/or Mr	This DPR is objectionable for its lack of a specified temporal scope. For reasons explained in response to DPR 15 above, the Claimants will produce responsive (non-privileged) documents that were	The State notes the Claimants' agreement to produce. However, the date range proposed by the Claimants is not acceptable to the State for the reasons explained at DPR 15 above.	The Tribunal notes the Claimants' agreement to produce documents in response to DPR 18 and confirms that the relevant period is 28 February 2013 until the date of Mr. Juma's death 5 May 2016.

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No.	Req. Party	Documents or Category of Documents Requested	Relevance and Materiality According to Requesting Party		Responses/ Objections to Document Request	Reply to Objections to Document Requests	Tribunal's Decision
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				Juma in the procurement of SML 351 and related consents.	created or received during the period from the date Mr Juma first approached the Claimants (28 February 2013) to the date on which SML 351 was revoked (5 August 2013).	The State proposes that Documents should be produced by the Claimants from 28 February 2013 (being the date Mr Juma first approached the Claimants) to date.	DPR 18 is GRANTED in part.
19.	R	Documents evidencing communications between the Claimants, PAW and/or Mr Juma in relation to SML 351 and any related consents.	Claimants' Memorial, paragraph 71 CWS-1 Anderson, paragraph 102	The documents are relevant and material to the assessment made by the Claimants as to the risks of corruption and the legality of the course of action that was undertaken by the Claimants and/or Mr Juma in the procurement of SML 351 and related consents.	This DPR is objectionable for its lack of a specified temporal scope. For reasons explained in response to DPR 15 above, the Claimants will produce responsive (non-privileged) documents that were created or received during the period from the date Mr Juma first approached the	The State notes the Claimants' agreement to produce. However, the date range proposed by the Claimants is not acceptable to the State for the reasons explained at DPR 15 above. The State proposes that Documents should be produced by the Claimants from 1 October	The Tribunal notes Claimants' agreement to produce documents in response to DPR 19 and directs that the relevant period is 28 February 2013 until the date of Mr. Juma's death 5 May 2016. DPR 19 is GRANTED in part.

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No.	Req. Party	Documents or Category of Documents Requested	Relevance and Materiality According to Requesting Party		Responses/ Objections to Document Request	Reply to Objections to Document Requests	Tribunal's Decision
			Reference to Submissions	Comments			
					Claimants (28 February 2013) to the date on which SML 351 was revoked (5 August 2013).	2009 (the date Mr Anderson first met Mr Townsend; <i>see</i> , Claimants' Memorial, para. 50) to date.	
20.	R	Documents evidencing any transfers of money from the Claimants and/or PAW, to Mr Juma and/or Mr Juma's company, Pwani Mining Limited, and/or any other person or entity related to Mr Juma.	Claimants' Counter Memorial, paragraphs 200 and 272 Exhibit C-179 Exhibit C-190	The documents requested are relevant and material to explaining the alleged flow of funds between the Claimants and/or PAW and Mr Juma in relation to Mr Juma's alleged investment.	This DPR is objectionable for its lack of a specified temporal scope. For reasons explained in response to DPR 15 above, the Claimants will produce responsive (non-privileged) documents that were created or received during the period from the date Mr Juma first approached the Claimants (28 February 2013) to the date on which SML 351 was revoked (5 August	The State notes the Claimants' agreement to produce. However, the date range proposed by the Claimants is not acceptable to the State for the reasons explained at DPR 15 above. The State proposes that Documents should be produced by the Claimants from 28 February 2013 (being the date Mr Juma first approached the Claimants) to date.	The Tribunal notes the Claimants' agreement to produce documents in response to DPR 20 and directs that the relevant period is 28 February 2013 until the date of Mr. Juma's death 5 May 2016. DPR 20 is GRANTED in part.

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			Reference to Submissions	Comments			
					2013).		
21.	R	Documents evidencing any payments made by Mr Juma (or any person or entity related to Mr Juma) to any third party on behalf of the Claimants and/or PAW and any communications relating thereto.	Claimants' Counter-Memorial, paragraph 272 Exhibit C-190	The documents requested are relevant and material to explaining the alleged flow of funds between the Claimants and/or PAW and Mr Juma in relation to the legality of his alleged services for and on behalf of the Claimants and/or PAW.	This DPR is objectionable for its lack of a specified temporal scope. The Claimants also note that this DPR seeks production of documents that the Claimants do not necessarily have in their possession, custody or control. For reasons explained in their response to State DPR 15 above, the Claimants will produce those responsive (non-privileged) documents that are in their possession, custody or control and which were created or received during the period	The State notes the Claimants' agreement to produce. However, the date range proposed by the Claimants is not acceptable to the State for the reasons explained at DPR 15 above. The State proposes that Documents should be produced by the Claimants from 28 February 2013 (being the date Mr Juma first approached the Claimants) to 5 May 2016 (the date of Mr Juma's death).	The Tribunal notes the Claimants' agreement to produce documents in response to DPR 18 and as noted above, the relevant period is 28 February 2013 until the date of Mr. Juma's death 5 May 2016. DPR 21 is GRANTED in part.

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			Reference to Submissions	Comments			
					from the date Mr Juma first approached the Claimants (28 February 2013) to the date on which SML 351 was revoked (5 August 2013).		
22.	R	Copy of the Swift advice transfer dated on or around 22 March 2013 referenced in Exhibit C-258.	CWS-2 Anderson paragraph 101 Exhibit C-258	<p>The documents requested are relevant and material to explaining the alleged flow of funds between the Claimants and/or PAW and Mr Juma in relation to Mr Juma's alleged investment.</p> <p>The Claimants rely on this document but have not exhibited a copy.</p>	<p>The Claimants are searching for this document and will produce it to the State if and when it is located.</p> <p>The Claimants note, however, that Mr Juma's investment in PAW is a matter in respect of which the Claimants bear the burden of proof. As such, this is strictly not a request that the State should be able to make (see the Claimants' response</p>	The State notes the Claimants' agreement to produce and fully reserves its position in respect of the objections raised.	<p>The Tribunal notes that in light of the Claimants' undertaking, the Respondent has withdrawn its request for a document production.</p> <p>As this request is not pursued, no order is made.</p>

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No.	Req. Party	Documents or Category of Documents Requested	Relevance and Materiality According to Requesting Party		Responses/ Objections to Document Request	Reply to Objections to Document Requests	Tribunal's Decision
			Reference to Submissions	Comments			
					to State DPR 10 above concerning the effect of the burden of proof on document production requests).		
23.	R	Documents evidencing the transfer of shares in PAW and/or First Western Limited to Mr Juma and/or Mr Juma's company, Pwani Mining Limited, and/or any other person or entity related to Mr Juma.	Exhibit C-179	The documents are relevant and material to establishing that the agreement with Mr Juma (Exhibit C-179) was a legitimate and bona fide business transaction by which Mr Juma agreed to invest in the Claimants and/or PAW.	This DPR is objectionable for its lack of a specified temporal scope. For reasons explained in response to DPR 15 above, the Claimants will produce responsive (non-privileged) documents that were created or received during the period from the date Mr Juma first approached the Claimants (28 February 2013) to the date on which SML 351 was revoked (5 August	The State notes the Claimants' agreement to produce. However, the date range proposed by the Claimants is not acceptable to the State for the reasons explained at DPR 15 above. The State proposes that Documents should be produced by the Claimants from 28 February 2013 (being the date Mr Juma first approached the Claimants) to date.	In light of the Claimants' agreement to produce documents in response to DPR 23 and for the reasons noted above, the relevant period is 28 February 2013 until the date of Mr. Juma's death 5 May 2016. DPR 23 is GRANTED in part.

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			Reference to Submissions	Comments			
					2013).		
24.	R	Documents evidencing the Claimants' alleged " <i>good faith attempts to comply with the Local Equity Regulation</i> " (Claimants' Counter-Memorial, paragraph 114).	Claimants' Counter-Memorial, paragraph 114 CWS-2 Anderson, paragraphs 114 - 120	These documents are relevant and material to determining the extent to which the Claimants complied with Kenyan law in the procurement of SML 351.	The Claimants do not accept that compliance with Kenyan law (including the <i>Local Equity Regulation</i>) is material to the Tribunal's jurisdiction or the admissibility of the Claimants' claims (See Claimants' Counter-Memorial on Preliminary Objections, Section B), or the dispute generally. Without prejudice to their position in this regard, and despite the State's failure to refer to its own case in its justification for this DPR, in the interests of cooperation, the	The State notes the Claimants' agreement to produce and fully reserves its position in respect of the objections raised.	In light of the Claimants' undertaking, the Respondent does not seek a production order at this time. As this request is not pursued, no order is made.

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No.	Req. Party	Documents or Category of Documents Requested	Relevance and Materiality According to Requesting Party		Responses/ Objections to Document Request	Reply to Objections to Document Requests	Tribunal's Decision
			Reference to Submissions	Comments			
					Claimants will produce such non-privileged documents that are responsive to the State's request as are located following a reasonable and proportionate search.		
25.	R	Copies of the compensation agreements referred to at CWS-2 Anderson paragraph 82.	CWS-2 Anderson paragraph 82	<p>The documents are relevant and material to the legality of SML 351 and to the Claimants' compliance with Kenyan law.</p> <p>The Claimants rely on these documents but have not exhibited copies.</p>	<p>The Claimants do not accept that these compensation agreements (or Kenyan law compliance more broadly) are material to the Tribunal's jurisdiction or the admissibility of the Claimants' claims (See Claimants' Counter-Memorial on Preliminary Objections, Section B), or the dispute generally.</p> <p>Notwithstanding the</p>	<p>The State notes the Claimants' agreement to produce and fully reserves its position in respect of the objections raised.</p>	<p>In light of the Claimants' undertaking, the Respondent does not seek a production order at this time.</p> <p>As this request is not pursued, no order is made.</p>

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No.	Req. Party	Documents or Category of Documents Requested	Relevance and Materiality According to Requesting Party		Responses/ Objections to Document Request	Reply to Objections to Document Requests	Tribunal's Decision
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					above and despite the State's failure to refer to its own case in making its request, in the interests of cooperation, the Claimants will produce such non-privileged documents that are responsive to the State's request as are located following a reasonable and proportionate search.		
26.	R	Copy of the agreement to purchase land referred to at CWS-2 Anderson paragraph 83.	CWS-2 Anderson paragraph 83 Exhibit C-251	The documents are relevant and material to the legality of SML 351 and to the Claimants' compliance with Kenyan law. The Claimants rely on this document but have not exhibited a copy.	As is evident when paragraphs 82 and 83 of CWS-2 Anderson are read together, State DPR 25 and this DPR 26 relate to the same documents. The Claimants' production under DPR 25 will therefore satisfy this request.	The State notes the Claimants' confirmation that the land purchase agreements, at paragraph 83 of CWS-2 Anderson, are the same as the compensation agreements, referred to at paragraph 82 of	In light of the Claimants' confirmation, the Respondent withdraws DPR 26. As this request is not pursued, no order is made.

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No.	Req. Party	Documents or Category of Documents Requested	Relevance and Materiality According to Requesting Party		Responses/ Objections to Document Request	Reply to Objections to Document Requests	Tribunal's Decision
			Reference to Submissions	Comments			
						CWS-2 Anderson. In light of that confirmation, the State confirms that it does not pursue this DPR.	
27.	R	Details of the landowners and evidence of payments made as described at CWS-2 Anderson paragraph 83.	CWS-2 Anderson paragraph 83	The documents are relevant and material to the legality of SML 351 and to the Claimants' compliance with Kenyan law. The Claimants rely on these documents but have not exhibited copies.	For reasons explained above under DPR 25, the Claimants do not accept that these documents are material. However, in the interests of cooperation, the Claimants will produce such non-privileged documents that are responsive to the State's request as are located following a reasonable and proportionate search.	The State notes the Claimants' agreement to produce and fully reserves its position in respect of the objections raised.	In light of the Claimants' undertaking, the Respondent does not seek a document production order at this time. As this request is not pursued at this stage, no order is made.
28.	R	A copy of the remittance confirmation for the	Exhibit C-253 CWS-2 Anderson	The documents are relevant and material to the legality	The Claimants object to this DPR on the	The State notes the Claimants'	In light of the Claimants'

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		Kshs.500,000 “licence fee” paid to the Ministry of Environment and Mineral Resources.	paragraph 87	<p>of SML 351 and to the Claimants' compliance with Kenyan law.</p> <p>The Claimants rely on this document but have not exhibited a copy.</p>	<p>following grounds:</p> <p><u>Documents within the possession, custody or control of the State</u></p> <p>The State has failed to state (as required by Article 3(c) of the IBA Rules) that the document it requests in this DPR is not in the possession, custody or control of the State or make a statement explaining the reasons why it would be unreasonably burdensome for the State to produce this document.</p> <p>This document is, by its very nature, already within the possession, custody or control of the State: the remittance</p>	<p>objections to this DPR. The State fully reserves its position in respect of those objections but, in the interests of cooperation, confirms that it does not intend to pursue this DPR.</p>	<p>objections, the Respondent indicates that it does not intend to pursue a production order at this time.</p> <p>As this request is not pursued at this stage, no order is made.</p>

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No.	Req. Party	Documents or Category of Documents Requested	Relevance and Materiality According to Requesting Party		Responses/ Objections to Document Request	Reply to Objections to Document Requests	Tribunal's Decision
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					<p>advice was created by the Ministry of Environment and Mineral Resources.</p> <p><u>Relevance</u></p> <p>In the State's explanation for its request, the State alleges that "[t]he Claimants rely on the document but have not exhibited a copy", and refers to paragraph 87 of CWS-2 Anderson and Exhibit C-253 in support of that contention. The State is mistaken: neither paragraph 87 of CWS-2 Anderson nor Exhibit C-253 makes any mention of the remittance advice.</p>		

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29.	R	A copy of the email from Professor Wahungu in reply to Mr Townsend's email dated 5 December 2012.	CWS-2 Townsend paragraph 13	<p>The documents are relevant and material to the legality of SML 351 and to the Claimants' compliance with Kenyan law.</p> <p>The Claimants rely on this document but have not exhibited a copy.</p>	<p>The Claimants have already produced the requested email. It is contained within Exhibit C-195. Exhibit C-195 is referred to in CWS-2 Townsend, para 13.</p>	<p>The State notes the Claimants' objections to this DPR. The State fully reserves its position in respect of those objections but, in the interests of cooperation, confirms that it does not intend to pursue this DPR.</p>	<p>In light of the Claimants' objection, the Respondent withdraws this DPR.</p> <p>As this request is not pursued, no order is made.</p>
B. Other jurisdictional issues							
30.	R	Copies of CMK's annual returns for 2007 and 2008	CWS-2 Anderson, paragraph 10 Exhibit C-201	<p>The documents are relevant and material to determining the alleged ownership of CMK by Cortec UK and Stirling and the Claimants' standing <i>rationae personae</i>.</p>	<p>The Claimants object to this DPR on the following ground:</p> <p><u>Documents within the possession, custody or control of the State</u></p> <p>At paragraph 350 of the State's Counter-Memorial, the State says it has accessed</p>	<p>The State replies to the Claimants' grounds of objection to this DPR on the following basis:</p> <p><u>Documents within the possession, custody or control of the State</u></p> <p>The State</p>	<p>The Respondent states that it does not have a copy of the CMK annual return for 2007 in its custody, possession or control and the same is ordered to be produced by the Claimants.</p> <p>DPR 30 is</p>

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					records filed with the Registrar of Companies in Kenya. CMK's annual returns are contained in those records and are therefore already in the possession, custody or control of the State.	previously exhibited the "official records filed with the Registrar of Companies in Kenya" which it had located (State's Counter-Memorial, para. 350 and Exhibits R-142, R-143, R-156 and R-157). Those records did not include the annual returns for 2007 and 2008. In the course of its document searches, the State has since located a copy of CMK's annual return for 2008 and therefore narrows its DPR to a copy of CMK's annual return for 2007, which is not contained in	GRANTED.

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						<p>CMK's file held by the Registrar of Companies.</p> <p>This Document is not within the possession, custody or control of the State and should be produced by the Claimants to demonstrate that Cortec UK and Stirling are each (and were at all relevant times) 35% shareholders of CMK (CWS-2 Anderson, para. 10), which is relevant and material to the Tribunal's jurisdiction <i>ratione personae</i>.</p>	
31.	R	All documents containing any assessment by the Claimants and/or PAW	Claimants' Counter-Memorial, paragraphs	The documents are relevant and material to determining the alleged ownership of	The Claimants object to this DPR on the	The State replies to the Claimants' grounds of	DPR 31 is allowed with respect to the relevant corporate

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		and/or their advisers in relation to the corporate standing, existence, structure and ownership of: (i) each of the Claimants; (ii) First Western Limited; (iii) Kingdom Minerals Limited; and (iv) any other entities related to the Claimants, under both UK and Kenyan law at all material times.	157 and 161 Exhibits C-192 and C-203	CMK by Cortec UK and Stirling and the Claimants' standing <i>rationae personae</i> . The Claimants rely on legal advice provided on this issue (Exhibits C-192 and C-203) and have therefore waived privilege in respect of any other advice on that issue.	following ground: <u>Overly broad and unduly burdensome</u> The State's request is unlimited or hopelessly vague in temporal scope. The State has not said what times are "material" for the purposes of the jurisdiction <i>ratione personae</i> , and it is clearly the State's burden (as the requesting party) to do so. This DPR is also excessively broad in its subject matter. As it stands, responding to this DPR would impose a considerable expense on the Claimants, not least because it would involve the	objection to this DPR on the following basis: <u>Overly broad and unduly burdensome</u> In response to the Claimants' objections on the basis of temporal scope, the State narrows the date range for this DPR to 4 July 2007 (the date of incorporation of CMK) to 7 June 2015 (the date of registration of these proceedings). Further, the State notes that this DPR does not in fact require the Claimants to search Documents from "any other entities related to the	records (not "assessments") in relation to the Claimant companies only (i.e. excluding First Western, Kingdom Minerals and "other entities") between 4 July 2007 and 7 June 2015 when the current proceeding was registered. Nevertheless, as request 31 extends to privileged as well as unprivileged documents, the Tribunal requests a privilege log be prepared by the Claimants for consideration. The Tribunal notes that in respect of legal advice, the Claimants have

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					<p>collection and search of documents from "<i>any other entities related to the Claimants</i>".</p> <p><u>Privilege</u></p> <p>The State is seeking documents that are privileged ("<i>assessments</i>" by "<i>advisers</i>" of PAW and the Claimants). The basis for the State's request is the erroneous assertion that the Claimants have waived privilege over the documents requested because they exhibited two legal opinions: Exhibits C-192 and C-203.</p> <p>The Claimants produced Exhibits C-192 and C-203 in order to respond to</p>	<p><i>Claimants</i>". Rather, the DPR requests any assessment by the Claimants and/or PAW and/or their advisors in relation to the corporate standing, existence, structure and ownership of (<i>inter alia</i>) "<i>any other entities related to the Claimants</i>". Nonetheless, in the interests of cooperation, the State confirms that it does not intend to pursue this DPR in respect of limb (iv) "<i>any other entities related to the Claimants, under both UK and Kenyan law at all material times</i>".</p> <p>Nonetheless, the</p>	<p>agreed to narrow its request to all legal advice procured by the Claimants on (i) the effect as a matter of English and Kenyan law of the administrative restorations of Cortec UK and Stirling as shareholders of CMK, and (ii) the corporate standing, existence, structure and ownership of CMK.</p> <p>The Claimants have exhibited C-192 and C-203 being letters from Robson Harris and Company Advocates for which privilege is claimed.</p> <p>In Exhibit C-203, Robson Harris note that "we have acted</p>

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					<p>the allegation made by the State that:</p> <p><i>"Cortec UK and Stirling were dissolved and struck off the English Companies Register and therefore did not exist as legal entities at the time of a further purported allotment of shares in CMK to Cortec UK and Stirling"</i> (State's Counter-Memorial, Section E2).</p> <p>The Claimants wish to point out the following flaws in the State's argument that privilege has been waived:</p> <ul style="list-style-type: none"> • First, the State has not provided 	<p>State confirms that it agrees to narrow limb (i) to CMK only. In addition, the State confirms that it does not pursue limbs (ii), (iii) and (iv) of this DPR.</p> <p><u>Privilege</u></p> <p>The State notes the Claimants' confirmation that the legal opinions exhibited by the Claimants as Exhibits C-192 and C-203 are privileged.</p> <p>However, the State considers that the Claimants' assessment that this privilege belongs to PAW is erroneous. Both legal opinions</p>	<p>as counsel for Cortec Mining Kenya...in connection with the acquisition by Pacific Wildcat...."</p> <p>The Claimants contend that their exhibits do not constitute a waiver of privilege. The Tribunal notes the Respondent has joined issue on whether waiver has occurred, but this issue need not be determined at this time.</p> <p>DPR 31 is GRANTED in part.</p>

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					any legal authority for its contention that, by producing Exhibits C-192 and C-203, the Claimants have waived privilege over documents containing "any assessment [...] in relation to the corporate standing, existence, structure and ownership [of the	were produced by Robson Harris & Co Advocates (" Robson Harris ") in the context of the acquisition of the shares in Stirling and Cortec UK by PAW. It appears that Robson Harris & Co Advocates were in fact advisers to Cortec Mining Kenya Limited and/or the Claimants, rather than PAW in the context of this transaction. In this regard Exhibit C-203 states: "We have acted as counsel for Cortec Mining Kenya Limited (the "Company") in connection with the acquisition by	

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					<p>Claimants, First Western Limited, Kingdom Minerals Limited; and any other entities related to the Claimants]" .</p> <ul style="list-style-type: none"> • Second, Exhibits C-192 and C-203 are legal opinions that were provided to PAW, not to the Claimants. PAW provided these 	<p><i>Pacific Wildcat Resources Corp. ("PAW") of the entire issued share capital of Stirling Capital Limited...". Further, Exhibit C-193 is another legal opinion produced by Anjarwalla & Khanna Advocates ("Anjarwalla"), which states "[w]e have acted as legal counsel in Kenya to [Pacific Wildcat]..in connection with the acquisition...of the entire issued share capital of Stirling Capital Limited....and Cortec (Pty) Ltd...". Accordingly PAW's advisors were Anjarwalla,</i></p>	

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					<p>opinions to the Claimants in the context of the transaction by which PAW acquired control of CMK. As such, the Claimants were never the holders of privilege over the legal opinions in Exhibits C-192 and C-203. Accordingly, as the Claimants were not the</p>	<p>and not Robson Harris.</p> <p>As is normal in transactions of this nature, the seller's legal advisors (in this case Robson Harris stated to be acting for CMK - but presumably also acting for Stirling and Cortec UK who held the shares in CMK) provided legal opinions to the buyer (PAW). Accordingly it appears that these legal opinions (at Exhibit C-192 and C-203), whilst they were addressed to PAW, were in fact being provided to PAW in its capacity as the</p>	

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No.	Req. Party	Documents or Category of Documents Requested	Relevance and Materiality According to Requesting Party		Responses/ Objections to Document Request	Reply to Objections to Document Requests	Tribunal's Decision
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					<p>privilege holders, they could not have waived privilege in the first place, let alone on any wider basis (as the State contends).</p> <ul style="list-style-type: none"> • Third, if (<i>arguendo</i>) privilege was waived in respect of Exhibits C-192 and C-203, it was waived on a specific and narrow issue: the effect, as a matter of 	<p>buyer in this transaction, rather than in any capacity as a client of Robson Harris.</p> <p>It follows that PAW does not, contrary to the Claimants' contention, hold any privilege in those legal opinions. Rather, the privilege in the Documents would instead belong to the Claimants.</p> <p>In these proceedings, the Claimants have elected to produce Exhibits C-192 and C-203 which set out legal advice procured by the Claimants on (i) the</p>	

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					<p>Kenyan law, of the restoration of an English company on the validity of a share transaction in a Kenyan company. It cannot be that a waiver on this narrow issue can amount to a blanket waiver of privilege over documents containing "any assessment [...] in relation to</p>	<p>effect as a matter of English and Kenyan law of the administrative restorations of Cortec UK and Stirling as shareholders of CMK, and (ii) the corporate standing, existence, structure and ownership of CMK.</p> <p>Accordingly, the Claimants have waived privilege over this category of Documents, namely all legal advice procured by the Claimants on (i) the effect as a matter of English and Kenyan law of the administrative restorations of Cortec UK and</p>	

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					<p><i>the corporate standing, existence, structure and ownership [of the Claimants, First Western Limited, Kingdom Minerals Limited; and any other entities related to the Claimants]</i>"</p> <p><u>Relevance</u>⁴⁶</p> <p>Even at its broadest,</p>	<p>Stirling as shareholders of CMK, and (ii) the corporate standing, existence, structure and ownership of CMK.</p> <p>The State agrees to narrow its request to these two categories of Documents.</p> <p>It is also noted that Exhibit C-203 is labelled "<i>Opinion 3</i>" in the cover email, although only two Robson Harris opinions have been produced. Accordingly it appears that further legal</p>	

⁴⁶ IBA Rules, Article 9(2)(a).

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					<p>the State's case on jurisdiction <i>ratione personae</i> only relates to the corporate standing and structure of the Claimants in this action. Thus, documents relating to First Western Limited, Kingdom Minerals Limited and "<i>any other entities related to the Claimants, under both UK and Kenyan law at all material times</i>" are manifestly irrelevant to the dispute.</p> <p>On the State's case, the issue of "<i>ownership</i>" is relevant to one company only: CMK. This is because, by virtue of Article 8(2) of the</p>	<p>opinions which may be responsive to this DPR do in fact exist.</p> <p>The State specifically responds to the Claimants' objection that privilege has not been waived on the following grounds:</p> <p><u>Commentary:</u> The IBA Rules permit arbitral tribunals to consider any possible waiver of any applicable legal privilege (see Article 9(3)(d)), in particular waiver by "<i>virtue of consent, earlier disclosure, affirmative use of the Documents, oral</i></p>	

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					<p>UK-Kenya BIT, CMK's standing as a claimant under the ICSID Convention is conditional upon the majority of shares in CMK being owned by UK nationals or companies (which they were and are). Thus, the State's request for documents assessing the "ownership" of any entity other than CMK must fail for lack of relevance.</p> <p><u>Materiality</u>⁴⁷</p> <p>The State has not explained how the requested documents are material to the outcome of the</p>	<p><i>communication or advice contained therein".</i></p> <p>Tribunals have also previously held that privilege has been waived over Documents where a party "<i>has made the existence of such advice part of ...[the] proceeding</i>".⁴⁸</p> <p><u>Documents provided to PAW:</u></p> <p>For the reasons set out above, the privilege belongs to the Claimants, not PAW as alleged by the Claimants.</p> <p><u>Narrow and</u></p>	

⁴⁷ IBA Rules, Article 9(2)(a).

⁴⁸ *Vito G. Gallo v Government of Canada*, UNCITRAL, PCA Case No. 55798, Procedural Order No. 3 dated 8 April 2009, para. 61.

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					<p>dispute. Even if the "assessments" of the Claimants, PAW or their advisers are relevant, they cannot be material (after all, the corporate standing, existence and structure of the Claimants, and the ownership of CMK, are matters that the Tribunal will determine for itself).</p>	<p><u>specific issue:</u> The State agrees to narrow its request to all legal advice procured by the Claimants on (i) the effect as a matter of English and Kenyan law of the administrative restorations of Cortec UK and Stirling as shareholders of CMK, and (ii) the corporate standing, existence, structure and ownership of CMK.</p> <p><u>Relevance</u></p> <p>The Claimants accept that the requested Documents are relevant to determining the true ownership of</p>	

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						<p>CMK by Cortec UK and Stirling. Further, the effect as a matter of English and Kenyan law of the administrative restorations of Cortec UK and Stirling as shareholders of CMK is relevant to the State's jurisdictional objections <i>rationae materiae</i> and <i>ratione personae</i>.</p> <p><u>Materiality</u></p> <p>The requested Documents are material to the corporate standing, existence, structure and ownership of CMK as well as the effect as a matter of English and</p>	

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						Kenyan law of the administrative restorations of Cortec UK and Stirling. These Documents are required, contrary to the Claimants' objection, to assist the Tribunal to determine whether they have jurisdiction <i>ratione personae</i> and <i>ratione materiae</i> over the Claimants.	
32.	R	Copies of all CMK accounts and financial statements (annual, management or otherwise) from January 2007 to December 2016 inclusive.	Claimants' Memorial, paragraph 146 Claimants' Counter-Memorial, paragraph 170 Exhibit C-98	The documents are relevant and material to: (i) determining the alleged ownership of CMK by Cortec UK and Stirling and the Claimants' standing <i>ratione personae</i> ; (ii) identifying the source of funds and (iii) establishing the extent of the Claimants' purported investment	The Claimants object to this DPR on the following ground: <u>Documents within the possession, custody or control of the State</u> At paragraph 350 of the State's Counter-Memorial, the State	The State replies to the Claimants' grounds of objection to this DPR on the following basis: <u>Documents within the possession, custody or control of the State</u>	Requests for “all CMK accounts and financial statements” from January 2007 to December 2016 is too broad and burdensome. However, the annual audited financial statements are relevant and must

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No.	Req. Party	Documents or Category of Documents Requested	Relevance and Materiality According to Requesting Party		Responses/ Objections to Document Request	Reply to Objections to Document Requests	Tribunal's Decision
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				<p>expenditure in Kenya.</p>	<p>says it has accessed records filed by CMK with the Registrar of Companies in Kenya. CMK's annual returns were filed with the Kenyan Registrar of Companies and should, therefore, already be in the possession, custody or control of the State.</p> <p><u>Overly broad and unduly burdensome</u></p> <p>The State has failed to specify the issues in dispute to which the requested documents relate (see also "Relevance" and "Materiality" below).</p> <p>Further, the Claimants have</p>	<p>The State previously exhibited the "<i>official records filed with the Registrar of Companies in Kenya</i>" which it had located (State's Counter-Memorial, para. 350 and Exhibits R-142, R-143, R-156 and R-157) and it is evident from those records that no financial statements were filed with the Kenyan Registrar of Companies (or if they were filed, they have not been located).</p> <p>Therefore, the requested Documents are not within the possession, custody</p>	<p>be produced</p> <p>The Respondent narrows its request to the period from 4 July 2007 (the date of incorporation of CMK) to 7 June 2015 (the date of registration of these proceedings). The Claimant is therefore ordered to produce the audited financial statements other than for the years 2011 and 2013 (Exhibit C-98) for the relevant period, i.e. 4 July 2007 to 7 June 2015.</p> <p>DPR 32 is GRANTED in part.</p>

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			Reference to Submissions	Comments			
					<p>already provided the State with CMK's audited accounts between 2011 and 2013 (Exhibit C-98) and the State has produced and relied on multiple accounts for Cortec UK and Stirling (State's Exhibits R-089 to R-097 inclusive).</p> <p>The State has not offered any explanation for the extensive temporal scope of this DPR – in particular, the State has not explained why it needs documents from the three years after the dispute arose.</p> <p><u>Relevance</u></p> <p>As to limb (i) of the State's justification,</p>	<p>or control of the State and should be produced by the Claimants to demonstrate the ownership of CMK and the source of CMK's funds which are relevant and material to the Tribunal's jurisdiction <i>ratione personae</i>.</p> <p>Moreover, the requested Documents are in a narrow and specific category and will be readily available to the Claimants.</p> <p><u>Overly broad and unduly burdensome</u></p> <p>The State has explained in this DPR that the requested Documents relate</p>	

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			Reference to Submissions	Comments			
					<p>the Claimants accept that the ownership of CMK by Stirling and Cortec UK is relevant (due to the operation of Article 8(2) of the UK-Kenya BIT). However, as noted above, the State already has documents (including audited accounts and CMK's file from the Kenyan companies registry) to prove the ownership of CMK.</p> <p>As to limb (ii) of the State's justification, the Claimants do not accept that the "<i>source of funds</i>" is relevant to the dispute: ICSID practice has firmly rejected the reading-in of an implied</p>	<p>to the following issues in dispute:</p> <ul style="list-style-type: none"> a) the alleged ownership structure of CMK by Cortec UK and Stirling and the Claimants' standing <i>rationae personae</i> (State's Counter-Memorial, Section V, subsection E); b) the source of funds (see, State's Counter-Memorial, paras 305- 	

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					<p>origin of capital requirement (see Claimants' Counter-Memorial, paragraphs 171-182).</p> <p>As to limb (iii) of the State's justification, while these documents are relevant to the Claimants investment expenditure in Kenya, that is (on any view) a matter for the Claimants to prove (and not, therefore, an area in which document production requests by the State should be entertained – see below).</p> <p><u>Materiality</u></p> <p>There is already a significant volume of documentation in the</p>	<p>313);</p> <p>c) the extent of the Claimants' purported investment expenditure in Kenya (State's Counter-Memorial, paras 292-321).</p> <p>Further, while the Claimants have produced CMK's accounts for 2011 to 2013, the State's DPR goes beyond those Documents and no accounts or other financial accounts or other financial Documents for those years, or years preceding</p>	

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					<p>record to show the ownership of CMK and the State has not explained how the requested documents would add to the existing body of evidence. The source of funds (or "origin of capital") is irrelevant to the dispute, and so documents requested on this basis cannot be material.</p> <p><u>Burden of proof</u></p> <p>In limb (iii) of the State's justification, the State says the requested documents are relevant and material to "<i>the extent of the Claimants' purported investment expenditure in Kenya</i>". This is for</p>	<p>2011, have been produced by the Claimants.</p> <p>Nonetheless, the State agrees to narrow its DPR to the date range of 4 July 2007 (the date of incorporation of CMK) to 7 June 2015 (the date of registration of these proceedings).</p> <p><u>Relevance</u></p> <p><u>Limb (i):</u> The Claimants accept that the requested Documents are relevant but they claim that the State has Documents proving the ownership of CMK. This is incorrect. The State does not have copies of</p>	

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					<p>the Claimants to prove as part of their damages claim. The Claimants recall the remarks of Bernard Hanotiau and Nathan O'Malley (extracted in the Claimants' response to DPR 10 above). The State should not be able to request documents on the basis that they are necessary for the Claimants to prove their case. If that is the basis for this request, the State's remedy is submission, not document production.</p>	<p>Documents proving the ownership of CMK at all relevant times, and does not have copies of any accounts and financial statements (annual, management or otherwise) for CMK (save for CMK's accounts for 2011 to 2013 at Exhibit C-98).</p> <p><u>Limb (ii)</u>: Contrary to the Claimants' case, the State contends that "<i>source of funds</i>" is relevant to the Tribunal's jurisdiction <i>ratione materiae</i>. The State's case is that the Claimants "<i>have failed to show that they have made a financial</i></p>	

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No.	Req. Party	Documents or Category of Documents Requested	Relevance and Materiality According to Requesting Party		Responses/ Objections to Document Request	Reply to Objections to Document Requests	Tribunal's Decision
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						<p><i>contribution of their own" and therefore, this DPR is relevant in determining this key legal issue in dispute (see, State's Counter-Memorial, para. 305).</i></p> <p>The Claimants' disagreement with the State's case that source of funds is relevant to jurisdiction <i>ratione materiae</i> is not a valid basis for objecting to this DPR.</p> <p><u>Limb (iii)</u>: The State contends that these Documents not only relate to "<i>a matter for the Claimants to prove</i>", but also a matter for the State</p>	

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						<p>to disprove. In respect of procedural economy, it would be substantially unfair to deprive the State of Documents that may assist it in disproving the Claimants' claims, on the basis of the contention that the burden is on the Claimants to prove the matter. We expand further on this point in our Reply to DPR 10.</p> <p>In any event, the State confirms that it does not maintain limb (iii) of its justification for this DPR, as that ground concerns quantification of loss which is</p>	

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						<p>outside the scope of this phase of the arbitration (see DPR 52 for further explanation regarding the State's position on the scope of this phase of the proceedings).</p> <p><u>Materiality</u></p> <p>The State has explained above how "<i>the requested documents would add to the existing body of evidence</i>". Furthermore the State has demonstrated that "<i>source of funds</i>" is an issue in dispute in these proceedings, and such requested financial Documents will</p>	

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No.	Req. Party	Documents or Category of Documents Requested	Relevance and Materiality According to Requesting Party		Responses/ Objections to Document Request	Reply to Objections to Document Requests	Tribunal's Decision
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						<p>facilitate a legal conclusion on that matter to be reached by the Tribunal. Therefore, the requested Documents in this DPR are material to the outcome of the case.</p> <p><u>Burden of proof</u></p> <p>The State repeats its Reply to the Claimants' "<i>Burden of proof</i>" objection in DPR 10 above.</p>	
33.	R	Documents evidencing the purported acquisition by Cortec UK and Stirling of shares in CMK in 2007, 2010 or otherwise, including <i>inter alia</i> company resolutions, board minutes, share purchase agreements,	<p>Claimants' Memorial, paragraphs 28 and 130</p> <p>Claimants' Counter-Memorial, paragraph 143</p> <p>Exhibits C-23 and C-201</p>	The documents are relevant and material to determining the alleged ownership of CMK by Cortec UK and Stirling and the Claimants' standing <i>rationae personae</i> .	<p>The Claimants object to this DPR on the following grounds:</p> <p><u>Documents within the possession, custody or control of the State</u></p> <p>The State's</p>	<p>The State replies to the Claimants' grounds of objection to this DPR on the following basis:</p> <p><u>Documents within the possession, custody or control</u></p>	<p>These documents are relevant to the objection <i>rationae personae</i> and must be produced.</p> <p>DPR 33 is GRANTED.</p>

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		stock transfer forms, and documents that evidence payment for the shares and share registration documents.			<p>justification for this DPR is that the documents are "<i>relevant and material to determining the alleged ownership of CMK</i>".</p> <p>However, at paragraph 350 of the State's Counter-Memorial, the State says it has accessed records filed by CMK with the Registrar of Companies in Kenya. These records show the ownership of CMK and dealings in the company's shares. The State is therefore already in the possession, custody or control of at least some of the information it seeks</p>	<p><u>of the State</u></p> <p>The State has exhibited the "<i>official records filed with the Registrar of Companies in Kenya</i>" which it had located (State's Counter-Memorial, para. 350 and Exhibits R-142, R-143, R-156 and R-157) and it is evident from those records that none of the requested Documents were filed with the Kenyan Registrar of Companies (or if they were filed, they have not been located).</p> <p>Therefore, the requested Documents are not</p>	

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No.	Req. Party	Documents or Category of Documents Requested	Relevance and Materiality According to Requesting Party		Responses/ Objections to Document Request	Reply to Objections to Document Requests	Tribunal's Decision
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					<p>in this DPR.</p> <p><u>Materiality</u></p> <p>As the Claimants set out at paragraph 148 of the Claimants' Counter-Memorial on Preliminary Objections, whether or not Cortec UK and Stirling acquired additional shares in CMK does not affect the Tribunal's jurisdiction. Accordingly, documents requested by the State in relation to this issue are not material to the outcome of the dispute.</p> <p><u>Unduly burdensome</u></p> <p>The State's request is for a wide range (indeed, an open-ended class) of</p>	<p>within the possession, custody or control of the State and should be produced by the Claimants to demonstrate the ownership of CMK, which is relevant and material to the Tribunal's jurisdiction <i>ratione personae</i>.</p> <p>The State has pleaded that "<i>the corporate history presented by the Claimants in the Memorial of Claim is not only highly selective, it is replete with omissions and is entirely misleading</i>" (State's Counter-Memorial,</p>	

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					documents. The Claimants have already produced evidence establishing that Cortec UK and Stirling are (i) UK corporate entities and (ii) investors in CMK (see Exhibits C-3, C-4 and C-24). The State has also produced and relied on multiple accounts for Cortec UK and Stirling (State's Exhibits R-089 to R-097 inclusive). The State has not explained why the existing record is insufficient and the Claimants should not be burdened with an obligation to make redundant production. For this reason, the State has also failed to	para. 341). <u>Materiality</u> The requested Documents are material to the outcome of the case as the Claimants have " <i>made inconsistent statements in their pleadings in these proceedings regarding the ownership of CMK</i> " and, as the State has previously emphasised, the Claimants must " <i>clarify the position and properly evidence Cortec UK's and Stirling's purported ownership of CMK</i> " (State's Counter-Memorial,	

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					demonstrate the materiality of the documents requested.	<p>para. 348). The Claimants have so far failed to fully demonstrate the ownership of CMK at all relevant times and therefore the requested Documents are material to that issue and to the outcome of the case and, in particular, the Tribunal's jurisdiction <i>ratione personae</i>.</p> <p>The Claimants seek to argue that the acquisition of additional shares in CMK by Cortec UK and Stirling in 2010 does not affect jurisdiction (Claimant's Counter-Memorial, para. 148).</p>	

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						<p>However, the State's request is not limited to 2010, rather the State seeks Documents relating to all acquisitions of shares in CMK by Cortec UK and Stirling.</p> <p>Furthermore, the apparent transfer of Cortec UK's and Stirling's respective shareholdings to Uppal (Botswana) (Proprietary) Limited in or around 2008 remains an issue in dispute. If that transfer took place then the purported allotment of shares in CMK to Cortec UK and Stirling in 2010 was invalid, as neither Cortec</p>	

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						<p>UK and Stirling were shareholders at the time and were therefore unable to vote on the disputed shareholder resolution to increase the share capital of CMK and to allot shares to themselves. This would in turn have a critical impact on jurisdiction, as, contrary to the Claimants' case, Cortec UK and Stirling would not be able to establish that they were shareholders - let alone majority shareholders - in CMK at all relevant times.</p> <p><u>Unduly</u></p>	

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						<p><u>burdensome</u></p> <p>The State contends that this DPR is not unduly burdensome. This DPR is narrow and specific, clearly identifying a specific category of Documents and identifying the relevant classes of Document, such as "board minutes" or "share transfer forms". Such Documents are usually labelled as such and therefore any search for the requested Documents could be easily narrowed.</p> <p>The Claimants rely on three Documents produced with their</p>	

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						<p>Memorial of Claim to support the position that sufficient evidence is already on the record in these proceedings to evidence Cortec UK's and Stirling's ownership of CMK. We assume the reference to Exhibit C-24 is intended to be a reference to Exhibit C-23. Exhibit C-23 is a register of members which as the State has contended "<i>appears to be an internal document and not an official document</i>" (State's Counter-Memorial, para. 343). Accordingly the manifest</p>	

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						deficiencies in the corporate history and ownership of CMK identified in the Respondent's Counter-Memorial still have not been addressed with supporting documentary evidence. The State therefore reiterates that these Documents are material to establishing the Tribunal's jurisdiction <i>ratione personae</i> .	
34.	R	Documents evidencing correspondence and/or court filings regarding the administrative restoration of Cortec UK and/or the court ordered restoration of Stirling.	Respondent's Counter Memorial, paragraphs 150 - 157 Exhibits R-104 and R-105	The documents are relevant and material to evidencing the statements made to the UK Companies Registrar and/or the English Court with respect to the activities of Cortec UK and/or Stirling during the period of	The Claimants object to this DPR on the basis of materiality. As part of its jurisdiction objection (<i>ratione personae</i>), the State alleges that " <i>Cortec UK and</i>	The State notes the Claimants' objections to this DPR. The State fully reserves its position in respect of those objections but, in the interests	In light of the Claimants' objections, the Respondent indicates that it does not intend to pursue this DPR. The Claimants do

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				<p>strike off from the Companies Register and whether the assets of Cortec UK and/or Stirling vested <i>bona vacantia</i>. The documents are relevant and material to determining the alleged ownership of CMK by Cortec UK and Stirling and the Claimants' standing <i>rationae personae</i>.</p>	<p><i>Stirling were dissolved and struck off the English Companies Register and therefore did not exist as legal entities at the time of a further purported allotment of shares in CMK to Cortec UK and Stirling"</i> (State's Counter-Memorial, Section E2). In summary, the State's case is that the striking-off of Cortec UK and Stirling has resulted in a deficiency in those companies' ownership of CMK that was not cured by their restoration to the register. The Claimants' response (in summary) is that the retroactive restoration to the</p>	<p>of cooperation, confirms that it does not intend to pursue this DPR.</p>	<p>not dispute that for a time Cortec UK and Sterling were struck off the English Companies Register but were later restored. The Claimants state that the restoration cured any relevant legal consequence from the companies being struck off. The Respondent disputes this position. The legal effect of these events will be a matter of argument.</p> <p>As this request is not pursued, no order is made.</p>

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No.	Req. Party	Documents or Category of Documents Requested	Relevance and Materiality According to Requesting Party		Responses/ Objections to Document Request	Reply to Objections to Document Requests	Tribunal's Decision
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					<p>register means there is no deficiency in Cortec UK's and Stirling's ownership of CMK. The issue in dispute is the <i>legal</i> question as to what effect (if any) the striking off and subsequent retroactive restoration of Cortec UK and Stirling to the English Companies Register has on their ownership of CMK. There is no dispute regarding the facts.</p> <p>The Claimants do not dispute that Cortec UK and Stirling were, for a time, struck off the English Companies Register. Each company was, however, restored</p>		

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					<p>with retroactive effect. The State, for its part, acknowledges that they were restored:</p> <p><i>"It is noted that Stirling was administratively restored to the English Companies Register on 1 December 2010 and Cortec UK was administratively restored to the English Companies Register on 4 February 2011.</i></p> <p><i>A legal fiction exists in English law which states that the "general effect of administrative restoration to the register is that the company is deemed to have continued in</i></p>		

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No.	Req. Party	Documents or Category of Documents Requested	Relevance and Materiality According to Requesting Party		Responses/ Objections to Document Request	Reply to Objections to Document Requests	Tribunal's Decision
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					<p><i>existence as if it had not been dissolved or struck off the register. However, the validity of a shareholder resolution and the subsequent allotment of shares in a Kenyan company are matters of Kenyan law. As a matter of Kenyan law, the English law legal fiction is irrelevant. The automatic "deeming" provision in English law cannot be invoked to cure the lack of capacity, as a matter of Kenyan law, to vote on a shareholder resolution" (State's Counter-Memorial paras. 358-359).</i></p> <p>On the State's case,</p>		

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					the issue in dispute is a question of Kenyan law, which the Claimants have answered with documents and the independent expert opinion of Justice Torgbor. The documents the State requests will not help or harm either side's case because they could never impact the status of the laws of Kenya. The requested documents are therefore immaterial.		
35.	R	Financial statements and annual returns of Uppal (Botswana) (Proprietary) Limited for 2007 to 2016 inclusive.	Claimants' Counter-Memorial, paragraph 140	The documents are relevant and material to determining the alleged ownership of CMK by Cortec UK and Stirling and the Claimants' standing <i>rationae personae</i> .	The Claimants object to this DPR on the following grounds: <u>Relevance</u> As part of its jurisdiction objection (<i>ratione personae</i>),	The State replies to the Claimants' grounds of objection to this DPR on the following basis: <u>Relevance</u>	The alleged transfer of CMK shares to Uppal (Botswana) (Proprietary) Limited is relevant to jurisdiction <i>rationae personae</i> to the extent the requested

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					<p>the State alleges that Cortec UK and Stirling sold their shareholdings to Uppal by reference to unexecuted stock transfer forms. However, the State's justification for this DPR ("<i>determining the alleged ownership of CMK by Cortec UK and Stirling and the Claimants' standing rationae personae</i>") bears no link to the documents requested.</p> <p><u>Materiality</u></p> <p>The requested documents are irrelevant and cannot therefore be material.</p>	<p>The requested Documents are relevant to the outcome of the case, in particular the Claimants' standing <i>rationae personae</i>. The financial statements and annual returns of Uppal (Botswana) (Proprietary) Limited will demonstrate whether Cortec UK and Stirling "<i>transferred their respective shareholdings in CMK to [Uppal (Botswana) (Proprietary) Limited]</i>" (State's Counter-Memorial, para. 350), with the result that "<i>CMK ceased to be</i></p>	<p>documents are in the possession, custody or control of the Claimants they are to be produced.</p> <p>DPR 35 is GRANTED.</p>

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No.	Req. Party	Documents or Category of Documents Requested	Relevance and Materiality According to Requesting Party		Responses/ Objections to Document Request	Reply to Objections to Document Requests	Tribunal's Decision
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						<p><i>majority owned by UK companies"</i> (State's Counter-Memorial, para. 352). In this instance, CMK would no longer satisfy the criteria of Article 8(2) of the BIT and the Tribunal would lack jurisdiction <i>ratione personae</i>. Therefore, the State's justification demonstrates that the requested Documents are relevant to the outcome of the case.</p> <p><u>Materiality</u></p> <p>As the requested Documents are sufficiently relevant, the Documents are also</p>	

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No.	Req. Party	Documents or Category of Documents Requested	Relevance and Materiality According to Requesting Party		Responses/ Objections to Document Request	Reply to Objections to Document Requests	Tribunal's Decision
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						material to the outcome of the case, in particular establishing the Tribunal's jurisdiction <i>ratione personae</i> .	
C. Alleged legitimate expectations							
36.	R	Board minutes of CMK from July 2007 to date.	See, for example, Claimants' Memorial, paragraphs 19, 49, 71 and 105 - 109	The documents are relevant and material to, <i>inter alia</i> : (i) CMK's knowledge of the protected status of Mrima Hill and the requirements for an application for a mining licence; (ii) CMK's activities and plans with respect to Mrima Hill; (iii) establishing the extent of CMK's purported investment expenditure in Kenya; (iv) CMK's engagement of Mr Juma and instructions given to him; (v) CMK's decisions in respect of its applications for licences for Mrima Hill;	The Claimants object to this DPR on the following grounds: <u>Unreasonable burden</u> The State's request is overly broad. Since the destruction of the Claimants' investments in Kenya, the board minutes of CMK are no longer centrally located or accessible via a single folder. Rather the Claimants would be required to trawl through	The State, in the interests of cooperation, narrows this DPR to Board minutes of CMK from July 2007 to date, concerning Mrima Hill, including, but not limited to, any discussions regarding the applications for, and purported grant of, prospecting and mining licences in respect of Mrima Hill.	The Respondent has narrowed DPR 36 to board minutes concerning <i>Mrima Hill</i> , including but not limited to applications for and purported grant of prospecting and mining licences in relation to <i>Mrima Hill</i> . The Tribunal orders production of such documents. The relevant time period is 4 July 2007 (the date of incorporation of

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				<p>and (vi) decisions taken following the announcement of Cabinet Secretary Balala on 5 August 2013.</p>	<p>multiple hard copy and electronic files (dating back 10 years) in order to locate the documents requested. This is not proportionate to whatever (minimal) probative value the requested documents may have.</p> <p>The State's request is also duplicative. For example, documents relevant and material to CMK's engagement of Jacob Juma (limb (iv)) are covered by DPRs 18-21.</p> <p><u>Materiality</u></p> <p>While some of the limbs of the State's justification correspond to matters of general</p>	<p>The State replies to the Claimants' grounds of objection to this DPR on the following basis:</p> <p><u>Unreasonable burden</u></p> <p>The State does not consider that it would be overly burdensome for the directors and company secretary of CMK to undertake searches of their own records and emails for the requested Documents. The State has requested in its amended DPR "board minutes" concerning Mrima Hill and therefore any search can be</p>	<p>CMK) to 7 June 2015 (the date of registration of these proceedings).</p> <p>The Tribunal notes the Claimants' concern regarding the difficulties of assembling these documents since the demise of its Kenya venture. However at the same time, the Claimants say that "to the extent any board minutes are material to disputed issues regarding quantum, they will be produced during the quantum phase of the arbitration". Accordingly, the Claimants must have some expectation of being able to locate at least some of the</p>

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					<p>relevance to the case (e.g. CMK's activities at Mrima Hill), none of the documents requested are material to the outcome of an issue in dispute. Specifically:</p> <p>Limb (i): even if (<i>arguendo</i>) the "knowledge of the protected status of Mrima Hill and the requirements for an application for a mining licence" was relevant (and the State has not explained how it is), the board minutes of CMK, as a set, would not be material to an issue in dispute regarding "CMK's knowledge" in the general terms described by the</p>	<p>narrowed to such Documents.</p> <p>The Claimants contend that this DPR is duplicative of DPRs 18 to 21. The State confirms that, to the extent that all Documents responsive to this DPR are produced in respect of DPRs 18 to 21, then no additional Documents are requested in respect of this DPR.</p> <p><u>Materiality</u></p> <p><u>Limb (i):</u> The requested Documents are material to the outcome of the case, as they will evidence or disprove the Claimants' case on</p>	<p>documents.</p> <p>In the circumstances, the Claimants are ordered to use their best efforts to produce the extracts of the board minutes relevant to Mrima Hill from 4 July 2007 to 7 June 2015. If the record are not located the Claimants are to provide the Respondent with a description of their "best efforts".</p> <p>DPR 36 is GRANTED in part.</p>

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					<p>State. It is unclear what point in dispute the State considers will be evidenced by the requested documents.</p> <p>Limb (ii): the State has not offered any explanation for how "<i>CMK's activities and plans with respect to Mrima Hill</i>" are an issue in dispute and so materiality is not established.</p> <p>Limb (iii): the requested documents may have relevance to the Claimants' quantum claim but they could not be determinative of quantum. To the extent any board minutes are material to disputed issues</p>	<p>legitimate expectations, and the State's defence on legitimate expectations.</p> <p>In particular, the requested Documents will evidence the Claimants' knowledge of the protected status of Mrima Hill and the requirements for the application of a mining licence, and the extent to which CMK had complied with them, such as is required to determine whether the "<i>Claimants knew - but failed to comply with - the requirements for the grant of a mining lease under Kenyan law</i>"</p>	

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					<p>regarding quantum, they will be produced during the quantum phase of this arbitration (see the Claimants' comments on State DPR 51 below).</p> <p>Limb (iv): Jacob Juma did not invest in PAW until 2013. The entire set of board minutes cannot be relevant and material to limb (iv).</p> <p>Limb (v): the Claimants do not see how the "<i>CMK's decisions in respect of its applications for licences for Mrima Hill</i>" differs from limb (i) of the State's attempted justification. Accordingly, it is unclear what point in</p>	<p>(State's Counter-Memorial, para. 461).</p> <p><u>Limb (ii)</u>: The requested Documents are material to the jurisdictional issue of whether the Claimants' purported investment falls within the scope of Article 25 of the ICSID Convention. One of the requirements of the <i>Salini</i> test is "certain duration of performance", and this DPR will go to establishing whether the purported investments of the Claimants had the necessary duration of performance.</p>	

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					<p>dispute the State considers will be evidenced by the requested documents.</p> <p>Limb (vi): the State has not offered any explanation of how "<i>decisions taken following the announcement of Cabinet Secretary Balala on 5 August 2013</i>" are relevant (let alone material) to any issues in dispute.</p> <p><u>Burden of proof</u></p> <p>The State has not supported this DPR by any reference to its own case (the State refers to the Claimants' pleadings alone). It seems, therefore, that the State is seeking production of</p>	<p>The requested Documents will show whether the Claimants intended to hold the purported investment on a long-term basis, and undertake activity "<i>pursuant to the actual rights granted by the purported investment</i>", which tribunals have held to be a "<i>key factor in establishing duration</i>" (<i>see, State's Counter-Memorial, para, 328</i>).</p> <p><u>Limb (iii)</u>: The requested Documents are relevant to the State's case on the merits and its</p>	

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					documents on the basis that they go to matters within the Claimants' burden of proof. For reasons explained under DPR 10 above, that is a flawed basis for a document production request.	jurisdiction objection, in particular whether there was any contribution of capital from the Claimants (<i>see</i> , State's Counter-Memorial, paras 292-313). The requested Documents are not requested in relation to the Claimants' quantum claim, quantification of loss not being an issue in this phase of the arbitration. <u>Limb (iv)</u> : This limb is relevant to the role of Jacob Juma in connection with the Claimants. As Jacob Juma was not put forward as a	

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						<p>witness by the Claimants (which they had an opportunity to do so in their Memorial), it is important to understand his role in relation to the Claimants and their investments. However, the State narrows its DPR in respect of limb (iv) to the period of 28 February 2013 (the date of Mr Juma's first contact with the Claimants) to date.</p> <p><u>Limb (v):</u> This limb is related to limb (i), in that CMK's decisions in light of its knowledge regarding the requirements of an application for a</p>	

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						<p>mining licence are relevant to determining whether the Claimants had legitimate expectations, and in particular whether the "<i>Claimants knew - but failed to comply with - the requirements for the grant of a mining lease under Kenyan law</i>" (State's Counter-Memorial, para. 461).</p> <p>The State is content for limbs (i) and (v) to be treated as one limb of the State's justification for this DPR.</p> <p><u>Limb (vi):</u> Documents evidencing</p>	

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						<p>decisions taken following CS Balala's announcement on 5 August 2013 are clearly relevant to the merits. In particular, CMK's decision not to participate in the Task Force is relevant to the merits of the Claimants' claims for expropriation and the alleged breach of the FET standard (see Reply to DPR 48 for further explanation regarding this issue).</p> <p><u>Burden of proof</u></p> <p>The State repeats its Reply to the Claimants' "<i>Burden of proof</i>" objection</p>	

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						in DPR 10 above.	
37.	R	Documents evidencing communications between the Claimants <i>inter se</i> and/or PAW and/or consultants engaged by the Claimants and/or the Respondent in relation to the protected status of Mrima Hill and the requirement for degazettement.	Claimants' Counter-Memorial, paragraph 89 CWS-2 Anderson 37 Exhibit C-218 Respondent's Counter-Memorial, paragraphs 46 and 115	The Respondent argues that Mrima Hill had to be degazetted as a forest reserve, a nature reserve and a national monument before any mining could take place (Respondent's Counter-Memorial, paragraph 115). The Claimants deny this (Claimants' Counter-Memorial, paragraph 89). The documents are relevant and material in demonstrating the Claimants' knowledge of the requirement to degazette Mrima Hill and their legitimate expectations upon the purported issuance of SML 351.	The Claimants object to this DPR on the following grounds: <u>Documents within the possession, custody or control of the State</u> Part of the State's request relates to communications between the Claimants and the State. The Claimants object to that element of the State's DPR on the basis that such documents are by their very nature (or ought reasonably to be) already in the possession of the State (and the State has not stated otherwise, as	The State confirms that it does not seek copies of communications between the Claimants and the Respondent. The State does, however, request copies of any Documents which evidence communications between the Claimants and the Respondent. The State replies to the Claimants' grounds of objection to this DPR on the following basis: <u>Documents within the possession, custody or control</u>	DPR 37 is allowed only to the extent of requiring the Claimants to produce communications with their consultants "in relation to the protected status of Mrima Hill and the requirement for degazettement." DPR 37 is GRANTED in part.

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					<p>required by Article 3(c) of the IBA Rules).</p> <p><u>Materiality</u></p> <p>According to the State, the relevant issue in dispute is the protected status of Mrima Hill. However, the State justifies its request on the basis that the requested documents are relevant and material to demonstrating "<i>the Claimants' knowledge of the requirement to degazette Mrima Hill and their legitimate expectations upon the purported issuance of SML 351</i>".</p> <p>The State has not explained how the</p>	<p><u>of the State</u></p> <p>The State does not agree that such Documents are, by their nature, in the possession of the State.</p> <p>In addition, as part of this DPR, the State has requested Documents evidencing communications between the Claimants <i>inter se</i> and/or PAW and/or consultants engaged by the Claimants. Those Documents are not, by their nature, Documents which ought to be in the State's possession, custody or control.</p> <p><u>Materiality</u></p>	

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					<p>Claimants' state of mind ("<i>knowledge</i>") vis-a-vis the legal status of Mrima Hill could be material to the issue of whether Mrima Hill did, as a matter of law, have to be "<i>degazetted as a forest reserve, a nature reserve and a national monument before any mining could take place</i>". The first limb of the State's attempted justification therefore <i>prima facie</i> fails for lack of materiality.</p> <p><u>Burden of proof</u></p> <p>As to the second limb of the State's attempted justification, the State claims the requested documents</p>	<p>The Claimants appear to have misunderstood the relevant issue in dispute in respect of this DPR. The relevant issue in dispute, as specified in the "Comments" column, is the level of the "<i>Claimants' knowledge of the requirement to degazette Mrima Hill and their legitimate expectations upon the purported issuance of SML 351.</i>"</p> <p>The requested Documents are material to the dispute as to whether the Claimants had any legitimate</p>	

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					are relevant to the Claimants' legitimate expectations but it does not refer to the Claimants' pleadings on the merits. If <i>(arguendo)</i> the requested documents are relevant to the Claimants' case on legitimate expectations, their production is a matter for the Claimants and not something the State should be able to demand in document production (see DPR 10 above).	expectations in respect of SPL 256 and SML 351. The State has argued in its Counter-Memorial that: " <i>[T]he Claimants' argument that SPL 256 automatically entitled the Claimants to a mining lease, irrespective of whether the requirements of the Mining Act have been met, and in an area known to the Claimants to be protected as a national monument (as well as a protected forest and nature reserve), is plainly wrong</i> " (State's Counter-Memorial,	

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						<p>para. 467). The State contends that "<i>the only legitimate expectation that the Claimants could reasonably and justifiably have held was that they would be entitled to <u>apply</u> for a mining lease</i>" (State's Counter-Memorial, para. 467) (emphasis added). Consequently, these Documents are material to the outcome of the case, and may assist the State in disproving the Claimants' case that it had legitimate expectations that it would be granted a mining lease.</p>	

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						<u>Burden of proof</u> The State repeats its Reply to the Claimants' " <i>Burden of proof</i> " objection in DPR 10 above.	
38.	R	Documents evidencing the Claimants' knowledge and understanding of the scope and effect of the rights granted by SPL 256 (including, amongst other things, the allegation made by the Claimants that SPL 256 gave CMK the automatic right to be granted a mining licence).	Claimants' Memorial, paragraphs 48, 52 and 62 Claimants' Counter-Memorial, paragraph 93	The documents are relevant and material to demonstrating the Claimants' alleged expectations in relation to SPL 256.	The Claimants object to this DPR on the following grounds: <u>Burden of proof</u> The Claimants do contend they had certain legitimate expectations arising from the terms of SPL 256 (see paragraph 182 of the Claimants' Memorial). However, the Claimants have not contended that CMK had the " <i>automatic</i> " right to be granted a mining licence (as	The State replies to the Claimants' grounds of objection to this DPR on the following basis: <u>Burden of proof</u> In response to the Claimants' contention that they rely on Clause 22 of SPL 256, the State's position is that " <i>the only legitimate expectation that the Claimants could reasonably and justifiably have held was that they</i>	The rights conferred or not conferred by SPL 256, and whether or not its wording gave rise to a legitimate expectation of a mining licence, is a matter for argument. The demand for documents evidencing the "Claimants' knowledge and understanding" of SPL 256 is not sufficiently probative to warrant an order for production. DPR 38 is

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					<p>the State suggests in this DPR). The Claimants have simply pointed to Clause 22 of SPL 256 (Exhibit C-6), which states:</p> <p><i>"[t]he Licensee having observed all its obligations hereunder shall be entitled to such further or other rights over the Area or any part or parts of the Area or to the grant of a Special Mining Lease or Leases for a period not exceeding twenty-one (21) years as provided by the Act"</i> (underline added).</p> <p>If (<i>arguendo</i>) the requested documents are relevant to the</p>	<p><i>would be entitled to apply for a mining lease"</i> (State's Counter-Memorial, para. 467), whereas the Claimants' case is that they were entitled outright to a mining licence (Claimants' Memorial, para. 36).</p> <p>The requested Documents are relevant to the outcome of the case, which is not disputed by the Claimants.</p> <p>The State repeats its Reply to the Claimants' "<i>Burden of proof</i>" objection in DPR 10 above.</p>	REJECTED.

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					Claimants' case on legitimate expectations, their production is a matter for the Claimants and not something the State should be able to demand in document production (see DPR 10 above).		
39.	R	Copies of all advice from Robson Harris & Co advocates and/or Anjarwalla & Khanna and/or Allen & Overy and/or Axium Law Corporation and/or any other legal advisors of the Claimants and/or PAW in relation the scope of rights held by and/or granted to CMK pursuant to SPL 256 and/or SML 351.	CWS-2 Townsend, paragraphs 5-9 CWS-1 Anderson, paragraphs 15 and 123 Exhibits C-192 and C-193	The documents are relevant and material as to the Claimants' alleged knowledge and understanding as to the rights granted to CMK pursuant to SPL 256 and SML 351, and to the Claimants' compliance with Kenyan law. The Claimants rely on legal advice provided on this issue (Exhibits C-192 and C-193) and have therefore waived privilege in respect of any other advice on that	The Claimants object to this DPR on the following grounds: <u>Relevance</u> The State has not explained how " <i>the Claimants' alleged knowledge and understanding as to the rights granted to CMK pursuant to SPL 256 and SML 351</i> " is relevant to any issue in dispute. The State's	In light of the State's narrowed DPR 31, the State does not pursue DPR 39 but notes the following: Exhibit C-193 is an opinion produced by PAW's legal advisers, Anjarwalla & Khanna Advocates which opines, amongst other things, on the	The Respondent indicates that it accepts the Claimants' claim to privilege "but will invite the Tribunal to draw its own inferences from the selective disclosure". As this request is not pursued, no order is made.

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				issue.	<p>justification for this DPR does not include any reference to the pleadings of either side.</p> <p><u>Privilege</u></p> <p>The State has not provided any legal authority for its contention that, by producing Exhibits C-192 and C-193, the Claimants have waived privilege over "<i>any other legal advisors of the Claimants and/or PAW in relation the scope of rights held by and/or granted to CMK pursuant to SPL 256 and/or SML 351</i>". Exhibit C-192 is an opinion from Robson Harris to PAW on the issue of the legal effect</p>	<p>validity of SPL 256 and the requirement of Kenya Forest Service consent in order to conduct mining in a state forest. Whilst PAW is not a party to these proceedings, PAW - a Canadian entity - is, on the State's case, the true investor along with Mr Anderson and Mr O'Sullivan in their personal capacities (State's Counter-Memorial, para. 22.2).</p> <p>The Claimants have been provided with a copy of the legal opinion addressed to PAW and seek to rely on it to establish the validity of SPL 256 (Claimants'</p>	

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					<p>(under Kenyan law) of the dissolution and restoration of Stirling and Cortec UK on CMK's 1 May 2010 annual general meeting and subsequent dealings. It does not address the "<i>scope of rights held by and/or granted to CMK pursuant to SPL 256 and/or SML 351</i>". Exhibit C-193 is a legal opinion from Anjarwalla & Khanna to PAW on the exploration rights granted to CMK. Both opinions were provided to PAW, and not the Claimants. As such, the Claimants were never the holders of privilege over the legal opinions in</p>	<p>Counter-Memorial, para. 94). However, the Claimants have not elected to produce any further legal opinions which address this issue and/or the validity of SML 351 which they obtained from their legal advisers. In circumstances where the Claimants have claimed privilege in respect of advice they have received on the validity of SPL 256 and SML 251, but have nonetheless produced a single legal opinion obtained by their parent company (who is not a party to these</p>	

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					<p>Exhibits C-192 and C-193. Accordingly, as the Claimants were not the privilege holders, the Claimants are not capable of waiving privilege in the manner the State contends.</p> <p><u>Materiality</u></p> <p>The State has not explained how the requested documents are or could possibly be material to the outcome of the dispute.</p>	<p>proceedings), there is a risk that the Claimants are simply cherry-picking Documents to disclose and using privilege as a shield to prevent broader disclosure.</p> <p>The requested Documents sought in this DPR would be relevant and material to the Claimants' knowledge of the rights granted to CMK pursuant to SPL 256 and SML 351, which in turn would inform the assessment of whether the Claimants had any legitimate expectations in respect of SPL 256</p>	

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						and SML 351. The State however accepts the Claimants' claim to privilege but will invite the Tribunal to draw its own inferences from the selective disclosure provided by the Claimants, including giving appropriate weight to Exhibit C-193 which has been produced in isolation.	
40.	R	Documents (including but not limited to Board minutes) prepared by any of the Claimants between 2011 and 2013 evidencing the Claimants' internal discussions regarding the application for a mining licence and/or the means of procuring it and/or the	Claimants' Memorial, paragraphs 62 - 71 CWS-2 Anderson, paragraphs 40 - 71	The documents are relevant and material as to the Claimants' alleged knowledge and understanding as to the rights granted to CMK pursuant to SPL 256 and/or SML 351, and to the Claimants' compliance with	The Claimants object to this DPR on the following grounds: <u>Unreasonable burden</u> The State's request is global and fails to specify in any meaningful way the subject matter of the	The State replies to the Claimants' grounds of objection to this DPR on the following basis: <u>Unreasonable burden</u> The Claimants'	The Tribunal has already ordered production of CMK board minutes dealing with the Mrima Hill project which would include "the application for a mining license and/or the means of

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		validity thereof.		Kenyan law.	documents it seeks. The generality of the State's request means it captures a very large volume of documents (especially given that, between 2011 and 2013, the Claimants were focused on applying for a mining licence). It cannot be that the State has a right to all of these documents or to force the Claimants to review them all, especially when they are not material. To do so would offend the principle of procedural economy. <u>Materiality</u> The State has not attempted to explain its assertion that	assertion that this DPR is "global" is unfounded. This DPR is narrow and specific, clearly identifying (i) the subject matter of the request - the Claimants' "application for a mining licence and/or the means of procuring it and/or the validity thereof", and (ii) a narrow date range of between 2011 and 2013. As will be expanded on below, the requested Documents are material to the outcome of the case and therefore the Claimants' comment on	procuring it and/or the validity thereof". The additional request in DPR 39 for documents evidencing internal discussions is to the extent such discussions at the board level are contained in CMK records they are to be produced. DPR 40 is REJECTED.

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					<p>these documents are material. The only area in which the Claimants' "<i>alleged knowledge and understanding as to the rights granted to CMK pursuant to SPL 256 and/or SML 351</i>" could possibly be material would be in the Claimants' legitimate expectations claim.</p> <p><u>Burden of proof</u></p> <p>To the extent that the requested documents are relevant to the Claimants' case on legitimate expectations, their production is a matter for the Claimants and not something the State should be able to demand in document</p>	<p>procedural economy lacks foundation.</p> <p><u>Materiality</u></p> <p>The requested Documents are material to the outcome of the case, as one of the State's objections to the Tribunal's jurisdiction is that the Claimants "<i>did not obtain their purported investment in accordance with Kenyan law</i>" (State's Counter-Memorial, Section V, subsection C2), as the Claimants failed to satisfy the legal requirements to obtain a valid mining licence (as well as a valid</p>	

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					production (see DPR 10 above).	<p>prospecting right and prospecting licence) (<i>see</i>, State's Counter-Memorial, paras 137 and 216).</p> <p>As recognised by the Claimants, the Claimants' knowledge as to the rights granted to CMK pursuant to SPL 256 and SML 351 and their compliance with Kenyan law are material to the dispute on whether the Claimants had any legitimate expectations in respect of SPL 256 and/or SML 351. For example, the State alleges that the Claimants "<i>knew when they procured the grant</i></p>	

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						<p><i>of SML 351 that they had not complied with the requirements under Kenyan law for the grant of a mining right" (State's Counter-Memorial, para. 475) (emphasis added) and these Documents are material to the State's ability to disprove the Claimants' case on legitimate expectations.</i></p> <p><u>Burden of proof</u></p> <p>As the requested Documents are relevant and material to the outcome of the case (in particular, the State's case on legitimate</p>	

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41.	R	<p>Documents evidencing communications between the Claimants and all employees and officials of the Respondent regarding the Claimants' alleged investments in Kenya, including, but not limited to:</p> <ol style="list-style-type: none"> 1. Benjamin Langwen; 2. Permanent Secretary Ali Mohammed; 3. Francis Kimemia; 4. Cabinet Secretary Balala; 	<p>Claimants' Memorial, paragraphs 72 and 75</p> <p>Exhibits C-135, C-218, C-220, C-253, C-279 and C-280</p>	<p>The documents are relevant and material to (i) the Claimants' understanding of the scope and alleged legality of the rights granted by SPL 256 and SML 351; (ii) the legality of the Claimants' alleged investments; and (iii) the extent to which the Claimants could have legitimate expectations in respect of the same.</p>	<p>The Claimants object to this DPR on the following grounds:</p> <p><u>Documents within the possession, custody or control of the State</u></p> <p>Here again the State has failed to state (as required by Article 3(c) of the IBA Rules) that the communications requested are not in the possession, custody or control of the State or make a statement explaining the reasons why it would be</p>	<p>expectations), the State repeats its Reply to the Claimants' "<i>Burden of proof</i>" objection in DPR 10 above.</p> <p>The State agrees to narrow this DPR to the listed officials.</p> <p>The State, in the interests of cooperation, also agrees to narrow this DPR to the date range of 22 May 2007 (the date of CMK's application for an exclusive prospecting licence) to date.</p> <p>In addition, the State confirms that it does not seek copies of any communications</p>	<p>The request (as modified by the Respondent's reply in column 6) is limited to the listed officials during the period 22 May 2007 (the date of CMK's application for an exclusive prospecting license) to date. In the Tribunal's view, the end date should be shortened to 7 June 2015 (the date of registration of these proceedings).</p> <p>The Respondent is entitled to communications in</p>

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			Reference to Submissions	Comments			
		5. Isaiya Kabira; 6. Deputy President Ruto; 7. Moses Masibo; and 8. Permanent Secretary Wa-Mwachai.			<p>unreasonably burdensome for the State to produce such communications.</p> <p>The State is requesting communications between the Claimants and the State's own officials. By their very nature, these documents are self-evidently within the State's possession, custody or control (or, at the very least, ought to be). The Claimants should not be forced to take on the burden of searching for these documents, especially given they are not material to the outcome of the case.</p> <p><u>Unreasonable burden</u></p>	<p>between the Claimants and the listed officials. The State does, however, request copies of any other Documents which evidence communications between the Claimants with the listed officials.</p> <p>The State replies to the Claimants' grounds of objection to this DPR on the following basis:</p> <p><u>Documents within the possession, custody or control of the State</u></p> <p>The State does not agree that such Documents are, by their nature, "<i>self-evidently within the</i></p>	<p>the possession, custody or control of the Claimants evidencing or commenting on communications with the listed officials in respect of the Mrima investment for that period.</p> <p>DPR 41 is GRANTED in part.</p>

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			Reference to Submissions	Comments			
					<p>The State's request is hopelessly broad: it contains no date range and it is for communications "regarding the Claimants' alleged investments in Kenya". It is manifestly unreasonable to burden the Claimants with the obligation to search for and produce documents matching this obtuse description.</p> <p><u>Materiality</u></p> <p>The State has failed to specify how the documents requested are material to any particular issues in dispute between the parties. The requested documents are immaterial and</p>	<p><i>State's possession, custody or control".</i> For example, if the Claimants created their own notes regarding communications with the listed officials then those Documents are not Documents which, by their nature, are within the State's possession, custody or control.</p> <p><u>Unreasonable burden</u></p> <p>The State contends that this amended DPR is not unduly burdensome or "hopelessly broad". This DPR is narrow and specific, clearly identifying (i) a specific category of</p>	

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					<p>the State's failure to reference its own case is revealing in this regard.</p> <p><u>Burden of proof</u></p> <p>In limb (iii) of its justification, the State contends that the requested documents are relevant and material to "<i>the extent to which the Claimants could have legitimate expectations in respect of [their investments]</i>". If (<i>arguendo</i>) this is correct, then the production of these documents is a matter for the Claimants and not something the State should be able to demand in document production (see DPR</p>	<p>Documents which relate to "<i>the Claimants' alleged investments in Kenya</i>" and (ii) the individuals who may have been recipients of such communications, being the Claimants and/or PAW. The Claimants have themselves identified the investments on which they rely, and therefore are in dispute, in this arbitration, such as its shares, SPL 256 (as renewed) and SML 351 (see, Claimants' Memorial, para. 133). Accordingly, it is not anticipated that there will be a large volume of</p>	

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No.	Req. Party	Documents or Category of Documents Requested	Relevance and Materiality According to Requesting Party		Responses/ Objections to Document Request	Reply to Objections to Document Requests	Tribunal's Decision
			Reference to Submissions	Comments			
					10 above).	<p>Documents responsive to this DPR.</p> <p><u>Materiality</u></p> <p>The requested Documents are material to the outcome of the case, as one of the State's objections to the Tribunal's jurisdiction is that the Claimants' <i>"purported investment was unlawful under international law"</i> (State's Counter-Memorial, Section V, subsection C3), as the <i>"manner in which the Claimants procured SML 351 was...tainted by corruption"</i> (State's Counter-Memorial,</p>	

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No.	Req. Party	Documents or Category of Documents Requested	Relevance and Materiality According to Requesting Party		Responses/ Objections to Document Request	Reply to Objections to Document Requests	Tribunal's Decision
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						<p>para. 229). Further, this DPR is material to the dispute as to the Claimants' understanding of the scope and alleged legality of the rights granted by SPL 256 and SML 351 and whether the Claimants had any legitimate expectations in respect of SPL 256 and/or SML 351. For example, "<i>CMK decided, with the intervention of Mr. Juma, to procure the illegal issuance of CML 351 [...] [and] [i]n these circumstances the Claimants could not have any</i></p>	

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						<p><i>legitimate expectation that SML 351 was lawful or that they were entitled to exclusive mining rights in respect of Mrima Hill on the basis of this illegal document"</i> (State's, Counter-Memorial, paras 477-478). As the State alleges that the Claimants "<i>knew when they procured the grant of SML 351 that they had not complied with the requirements under Kenyan law for the grant of a mining right"</i> (State's Counter-Memorial, para. 475) (emphasis added), these Documents are material to the</p>	

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No.	Req. Party	Documents or Category of Documents Requested	Relevance and Materiality According to Requesting Party		Responses/ Objections to Document Request	Reply to Objections to Document Requests	Tribunal's Decision
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						<p>State's ability to disprove the Claimants' case on legitimate expectations.</p> <p><u>Burden of proof</u></p> <p>In respect of limb (iii), the State repeats its Reply to the Claimants' "<i>Burden of proof</i>" objection in DPR 10 above.</p>	
42.	R	Documents evidencing communications between the Claimants <i>inter se</i> and/or PAW in relation to communications between the Claimants and all employees and officials of the Respondent concerning SPL 256, SML 351 or issues related thereto.	<p>Claimants' Memorial, paragraphs 56, 72 and 97</p> <p>CWS-1 Anderson, paragraphs 56, 58 - 59</p>	The documents are relevant and material to (i) the Claimants' understanding of the scope and alleged legality of the rights granted by SPL 256 and SML 351; (ii) the legality of the Claimants' alleged investments; and (iii) the extent to which the Claimants could have legitimate expectations in respect of the same.	The Claimants object to this DPR on the following grounds: <u>Documents within the possession, custody or control of the State</u> Part of this DPR is for communications between the Claimants and the "employees and	The State replies to the Claimants' grounds of objection to this DPR on the following basis: <u>Documents within the possession, custody or control of the State</u> This DPR does not seek	<p>This request is excessively broad and burdensome.</p> <p>DPR 42 is REJECTED.</p>

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			Reference to Submissions	Comments			
					<p>officials" of the State. By their very nature, these documents are self-evidently within the State's possession, custody or control (or, at the very least, ought to be). The Claimants should not be forced to take on the burden of searching for these documents, especially given they are not material to the outcome of the case.</p> <p><u>Unreasonable burden</u></p> <p>The State's request is hopelessly broad: it contains no date range and it is for communications "concerning SPL 256, SML 351 or issues related</p>	<p>"communications between the Claimants" and "employees and officials" of the State. Rather, this DPR seeks "Documents evidencing communications between the Claimants <i>inter se</i> and/or PAW <u>in relation to</u>" communications between the Claimants and employees and officials of the State. The requested Documents are not, therefore, within the State's possession, custody and control.</p> <p><u>Unreasonable</u></p>	

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No.	Req. Party	Documents or Category of Documents Requested	Relevance and Materiality According to Requesting Party		Responses/ Objections to Document Request	Reply to Objections to Document Requests	Tribunal's Decision
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					<p><i>thereto</i>". It is manifestly unreasonable to burden the Claimants with the obligation to search for and produce documents matching this obtuse description.</p> <p><u>Materiality</u></p> <p>This DPR is so broad that it is impossible to assess whether the documents requested are material.</p> <p><u>Burden of proof rule</u></p> <p>In limb (iii) of its justification, the State contends that the requested documents are relevant and material to "<i>the extent to which the Claimants could have legitimate expectations in</i></p>	<p><u>burden</u></p> <p>The State contends that this DPR is not unduly burdensome or "<i>hopelessly broad</i>". This DPR is for Documents between the Claimants <i>inter se</i> and/or PAW <u>in relation to</u> communications with the State concerning SPL 256 and SML 351. This DPR is narrow and specific, clearly identifying (i) a specific category of Documents which relate to "<i>SPL 256, SML 351 or issues related thereto</i>", and (ii) the entities or individuals who may have been recipients of such</p>	

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No.	Req. Party	Documents or Category of Documents Requested	Relevance and Materiality According to Requesting Party		Responses/ Objections to Document Request	Reply to Objections to Document Requests	Tribunal's Decision
			Reference to Submissions	Comments			
					<p><i>respect of [their investments]". If (arguendo) this is correct, then the production of these documents is a matter for the Claimants and not something the State should be able to demand in document production (see DPR 10 above).</i></p>	<p>communications, being the Claimants and/or PAW.</p> <p>Nonetheless, the State agrees to narrow this DPR to the date range of 22 May 2007 (the date of CMK's application for an exclusive prospecting licence) to date.</p> <p><u>Materiality</u></p> <p>The State disagrees that this DPR is "<i>so broad that it is impossible to assess whether the documents requested are material</i>". The requested Documents are material to the outcome of the case, and on this</p>	

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No.	Req. Party	Documents or Category of Documents Requested	Relevance and Materiality According to Requesting Party		Responses/ Objections to Document Request	Reply to Objections to Document Requests	Tribunal's Decision
			Reference to Submissions	Comments			
						<p>basis, the State repeats its materiality Reply in DPR 41 above.</p> <p><u>Burden of proof</u></p> <p>In respect of limb (iii), the State repeats its Reply to the Claimants' "<i>Burden of proof</i>" objection in DPR 10 above.</p>	
43.	R	Documents evidencing meetings between the Claimants and/or PAW and any employee or official of the Respondent concerning SPL 256, SML 351 or issues related thereto, including, but not limited to, the meetings held on (i) 6 and 7 March 2013 (Memorial paragraphs 72-74); (ii) 16 July 2013 (CWS-1 Anderson, paragraph	<p>Claimants' Memorial, paragraphs 45, 46, 56, 63, 69, 72, 74, 75 and 149</p> <p>CWS-1 Anderson, paragraph 144</p>	The documents are relevant and material to (i) the Claimants' understanding of the scope and alleged legality of the rights granted by SPL 256 and SML 351; (ii) the legality of the Claimants' alleged investments; and (iii) the extent to which the Claimants could have legitimate expectations in respect of the same.	The Claimants are willing to produce responsive (non-privileged) documents evidencing meetings held on (i) 6 and 7 March 2013 (Claimants' Memorial, paras 72-74); (ii) 16 July 2013 (CWS-1 Anderson, para 144); (iii) 11, 13 and 19 February	The State notes the Claimants' agreement to produce responsive Documents evidencing the specified meetings. However, on the face of the Claimants' Document production on 9 March 2017, the State has only been	<p>The Claimants have agreed to produce responsive <i>non-privileged</i> documents in relation to the meetings identified by the Respondent.</p> <p>As to any documents for which privilege is claimed, the Claimants will prepare a privilege log for the</p>

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No.	Req. Party	Documents or Category of Documents Requested	Relevance and Materiality According to Requesting Party		Responses/ Objections to Document Request	Reply to Objections to Document Requests	Tribunal's Decision
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		144); (iii) 11, 13 and 19 February 2014 (Memorial, paragraphs 107-109); and (iv) 20 February 2014 (CWS-1 Anderson, paragraph 176-181), and communications between the Claimants <i>inter se</i> and/or PAW in relation thereto.			<p>2014 (Memorial, paras 107-109); and (iv) 20 February 2014 (CWS-1 Anderson, paras 176-181).</p> <p>Other than in respect of these documents, the Claimants object to this DPR on the following grounds:</p> <p><u>Documents within the possession, custody or control of the State</u></p> <p>Here again the State has failed to state (as required by Article 3(c) of the IBA Rules) that the documents requested are not in the possession, custody or control of the State or make a statement explaining the reasons why it</p>	<p>able to identify two Documents that are responsive to this category by making a brief reference to the meeting on 16 July 2013 (CMK 001.001.2595 and CMK 001.001.1051).</p> <p>The State replies to the Claimants' grounds of objection to this DPR on the following basis:</p> <p><u>Documents within the possession, custody or control of the State</u></p> <p>The State confirms that it does not seek copies of any communications between the Claimants and/or PAW and any</p>	<p>consideration of the Tribunal. Otherwise, in respect of DPR 43, no order is made.</p>

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No.	Req. Party	Documents or Category of Documents Requested	Relevance and Materiality According to Requesting Party		Responses/ Objections to Document Request	Reply to Objections to Document Requests	Tribunal's Decision
			Reference to Submissions	Comments			
					<p>would be unreasonably burdensome for the State to produce such communications. The State is requesting records of meetings between the Claimants and the State's own officials. By their very nature, these documents are self-evidently within the State's possession, custody or control (or, at the very least, ought to be). The Claimants should not be forced to take on the burden of searching for these documents, especially given they are not material to the outcome of the case.</p>	<p>employee or official of the State. The State does, however, request copies of any other Documents which evidence meetings between the Claimants and/or PAW and any employee or official of the State concerning SPL 256, SML 351 or issues related thereto.</p> <p>The State does not agree that such Documents are, by their nature, "<i>self-evidently within the State's possession, custody or control</i>". For example, if the Claimants created their own notes of meetings with</p>	

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					<p><u>Unreasonable burden</u></p> <p>The State's request is overly broad, particularly as it relates to SML 351 (during the application process for which many meetings took place between the Claimants and the employees and officials of various State agencies).</p> <p>The Claimants also note that this DPR is duplicative of State DPR 42.</p> <p><u>Materiality</u></p> <p>While SPL 256 and SML 351 are of general relevance in this dispute, the State has not specified the "issues related thereto". In these</p>	<p>representatives of the State, then those Documents are not Documents which, by their nature, are within the State's possession, custody or control.</p> <p>In addition, as part of this DPR, the State requested Documents evidencing communications between the Claimants <i>inter se</i> and/or PAW concerning meetings between the Claimants and/or PAW and any employee or official of the State. Those Documents are also not, by their nature, Documents which</p>	

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No.	Req. Party	Documents or Category of Documents Requested	Relevance and Materiality According to Requesting Party		Responses/ Objections to Document Request	Reply to Objections to Document Requests	Tribunal's Decision
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					<p>circumstances, limbs (i) and (ii) of the State's purported justification are incapable of explaining how the requested documents are material to any particular issue in dispute. The requested documents are immaterial and the State's failure to reference its own case is revealing in this regard.</p> <p><u>Burden of proof</u></p> <p>In limb (iii) of its justification, the State contends that the requested documents are relevant and material to "<i>the extent to which the Claimants could have legitimate expectations in</i></p>	<p>ought to be in the State's possession, custody or control.</p> <p><u>Unreasonable burden</u></p> <p>In respect of the Claimants' contention that this DPR is duplicative of DPR 42, to the extent that all of the requested Documents are produced in respect of DPR 42, no additional Documents are requested in respect of this DPR.</p> <p>Nonetheless, the State agrees to narrow this DPR to the date range of 22 May 2007 (the date of CMK's application for an exclusive</p>	

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No.	Req. Party	Documents or Category of Documents Requested	Relevance and Materiality According to Requesting Party		Responses/ Objections to Document Request	Reply to Objections to Document Requests	Tribunal's Decision
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					<p><i>respect of [their investments]". If (arguendo) this is correct, then the production of these documents is a matter for the Claimants and not something the State should be able to demand in document production (see DPR 10 above).</i></p>	<p>prospecting licence) to date.</p> <p><u>Materiality</u></p> <p>SPL 256 and SML 351 are of central relevance to this dispute and the legality and validity of those purported licences and the Claimants' alleged legitimate expectations in respect of them are key issues in dispute.</p> <p>The State notes the Claimants' statement that, aside from the meetings referred to in this DPR, "<i>many meetings took place between the Claimants and the employees and officials of various</i></p>	

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No.	Req. Party	Documents or Category of Documents Requested	Relevance and Materiality According to Requesting Party		Responses/ Objections to Document Request	Reply to Objections to Document Requests	Tribunal's Decision
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						<p><i>agencies.</i>" It is critical that the State has access to Documents evidencing those meetings to the extent that they shed light on the legality of the Claimants' alleged investments and the Claimants' knowledge thereof. Such Documents are plainly material to the dispute regarding the Claimants' alleged legitimate expectations.</p> <p>The requested Documents are material to the outcome of the case, and on this basis, the State repeats its Reply to the Claimants'</p>	

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No.	Req. Party	Documents or Category of Documents Requested	Relevance and Materiality According to Requesting Party		Responses/ Objections to Document Request	Reply to Objections to Document Requests	Tribunal's Decision
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						<p>"Materiality" objection in DPR 41 above.</p> <p><u>Burden of proof</u></p> <p>In respect of limb (iii), the State repeats its Reply to the Claimants' "Burden of proof" objection in DPR 10 above.</p>	
44.	R	Documents evidencing the alleged " <i>strong support from a number of State officials, agencies and departments</i> " for the Mrima Hill project.	Claimants' Memorial, paragraph 75	The documents are relevant and material to the alleged legitimate expectations of the Claimants.	The State contends that the requested documents are relevant and material to " <i>alleged legitimate expectations of the Claimants</i> ". If (<i>arguendo</i>) this is correct, then the production of these documents is a matter for the Claimants and not something the State should be able to	The State notes the Claimants' objections to this DPR. The State fully reserves its position in respect of those objections but, in the interests of cooperation, confirms that it does not intend to pursue this DPR.	<p>In light of the Respondent's acceptance of the Claimants' objection, the Respondent does not pursue this DPR.</p> <p>As this request is not pursued, no order is made.</p>

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No.	Req. Party	Documents or Category of Documents Requested	Relevance and Materiality According to Requesting Party		Responses/ Objections to Document Request	Reply to Objections to Document Requests	Tribunal's Decision
			Reference to Submissions	Comments			
					demand in document production (see DPR 10 above).		
45.	R	Documents evidencing alleged reliance on " <i>the legitimate expectations generated by the terms of SPL 256</i> " and SML 351.	Claimants' Memorial, paragraphs 185 - 188	The documents are relevant and material to the alleged reliance by the Claimants on their alleged legitimate expectations.	<p>This request is duplicative of elements of DPR 38 and DPR 42. The Claimants repeat their objections to DPR 38 and DPR 42 as applicable to this request.</p> <p>If (<i>arguendo</i>) as the State contends, the requested documents are relevant and material to "<i>alleged legitimate expectations</i>" of the Claimants, then the production of these documents is a matter for the Claimants and not something the State should be able to demand in document</p>	<p>The State contends that this DPR is not duplicative of DPR 38 and DPR 42. This DPR relates to Documents evidencing "<i>alleged reliance</i>" on the legitimate expectations that the Claimants allege they had. In contrast, DPR 38 relates to the "<i>the Claimants' knowledge and understanding of the scope and effect of the rights granted by SPL 256</i>" and DPR 42 relates to "<i>communications between the</i></p>	<p>The request as framed is too broad and burdensome. To the extent the Claimants possess such documents and fail to produce them, such documents may of course be found inadmissible at the hearing on the merits.</p> <p>No order is made in respect of DPR 45.</p>

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					production (see DPR 10 above).	<p><i>Claimants inter se and/or PAW in relation to communications between the Claimants and all employees and officials of the Respondent concerning SPL 256, SML 351 or issues related thereto.</i></p> <p>Without prejudice to this, the State repeats its Reply to the Claimants' grounds of objections on the same basis as DPR 38 and DPR 42 above.</p> <p>Further, the State repeats its Reply to the Claimants' "Burden of proof" objection in DPR</p>	

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			Reference to Submissions	Comments			
						10 above.	
D. Alleged expropriation							
46.	R	Documents evidencing internal communications between the Claimants <i>inter se</i> and/or PAW regarding Cabinet Secretary Balala's announcement on 5 August 2013 and its alleged effect.	Claimants' Memorial, paragraph 94 CWS-1, Anderson, paragraphs 147 - 148	The documents are relevant and material to the Claimants' understanding of the status of SML 351 following Cabinet Secretary Balala's announcement on 5 August 2013.	The Claimants object to this DPR on the following grounds: <u>Unreasonable burden</u> The State's request is hopelessly broad: it contains no date range and it is for communications " <i>regarding Cabinet Secretary Balala's announcement on 5 August 2013 and its alleged effect.</i> " It is manifestly unreasonable to burden the Claimants with the obligation to search for and produce documents matching this obtuse description,	The State notes the Claimants' grounds of objection to this DPR. The State maintains that the requested Documents are clearly relevant and material, for the reasons set out in the Reply to the objection to DPR 48. However, the State recognises that there is a degree of overlap between this DPR and DPR 48 (as explained further in the Reply to DPR 48), and on that basis the State does not pursue this DPR 46.	In light of the Claimants' objection, the Respondent has stated that it does not pursue DPR 46. As this request is not pursued, no order is made.

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					<p>especially considering that the revocation of SML 351 (by the announcement of 5 August 2013) and its "effect" have been the primary concern of the Claimants for the last three and a half years.</p> <p><u>Relevance</u></p> <p>The State has not attempted to demonstrate how documents that show the Claimants' "understanding of the status of SML 351 following Cabinet Secretary Balala's announcement on 5 August 2013" are relevant to any issue in dispute. Plainly, they are not.</p>		

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No.	Req. Party	Documents or Category of Documents Requested	Relevance and Materiality According to Requesting Party		Responses/ Objections to Document Request	Reply to Objections to Document Requests	Tribunal's Decision
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					<u>Materiality</u> The State has not demonstrated the requested documents are relevant. They cannot, therefore, be material to the outcome of the dispute.		
47.	R	Documents evidencing communications by the Claimants with the Task Force, including but not limited to, all documents relating to the Claimants' letter to the Task Force dated 27 August 2013.	Respondent's Counter-Memorial, paragraph 164 Exhibit R-039	The documents are relevant and material to the Claimants' understanding of the status of SML 351 following Cabinet Secretary Balala's announcement on 5 August 2013.	The Claimants object to this DPR on the following grounds: <u>Documents within the possession, custody or control of the State</u> Here again the State has failed to state (as required by Article 3(c) of the IBA Rules) that the documents requested are not in the possession, custody or control of the State or make a	The State notes the Claimants' agreement to produce and fully reserves its position in respect of the objections raised.	The Respondent notes the undertaking of the Claimants and seeks no order. As this request is not pursued, no order is made.

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No.	Req. Party	Documents or Category of Documents Requested	Relevance and Materiality According to Requesting Party		Responses/ Objections to Document Request	Reply to Objections to Document Requests	Tribunal's Decision
			Reference to Submissions	Comments			
					<p>statement explaining the reasons why it would be unreasonably burdensome for the State to produce such communications.</p> <p>The State's request is primarily for communications between the Claimants and the State's own officials (the members of the Task Force). By their very nature, these documents are self-evidently within the State's possession, custody or control (or, at the very least, ought to be). The Claimants should not be forced to take on the burden of searching for these documents.</p>		

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No.	Req. Party	Documents or Category of Documents Requested	Relevance and Materiality According to Requesting Party		Responses/ Objections to Document Request	Reply to Objections to Document Requests	Tribunal's Decision
			Reference to Submissions	Comments			
					Notwithstanding the above, the Claimants will produce such non-privileged documents that are responsive to the State's request as are located following a reasonable and proportionate search.		
48	R	Documents evidencing communications between the Claimants and/or PAW, and any employee or official of the Respondent relating to (i) Cabinet Secretary Balala's announcement on 5 August 2013 and its alleged effect (including but not limited to the alleged telephone call with Mr Masibo on 5 August 2013), and (ii) the Task Force.	Claimant's Memorial, paragraph 97 Respondent's Counter-Memorial, paragraph 164 Exhibit R-039 CWS-1, Anderson, paragraph 147	The documents are relevant and material to the Claimants' understanding of the status of SML 351 following Cabinet Secretary Balala's announcement on 5 August 2013.	The Claimants object to this DPR on the following grounds: <u>Documents within the possession, custody or control of the State</u> Here again the State has failed to state (as required by Article 3(c) of the IBA Rules) that the documents requested are not in the possession, custody or control of the	The State replies to the Claimants' grounds of objection to this DPR on the following basis: <u>Documents within the possession, custody or control of the State</u> The State confirms that it does not seek copies of any communications between the Claimants and/or	The DPR directed is to the two listed events but encompasses any employee or officials of the Respondent or if the Claimants and is too broad and would be unduly burdensome and disproportionate to any probative value. DPR 48 is REJECTED.

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					<p>State or make a statement explaining the reasons why it would be unreasonably burdensome for the State to produce such communications. Part of the State's request is for communications between the Claimants and the State's own officials. By their very nature, these documents are self-evidently within the State's possession, custody or control (or, at the very least, ought to be). The Claimants should not be forced to take on the burden of searching for these documents.</p> <p><u>Relevance</u></p>	<p>PAW and any employee or official of the State. The State does, however, request copies of any other Documents which evidence communications between the Claimants and/or PAW and any employee or official of the State. The State does not agree that such Documents are, by their nature, "<i>self-evidently within the State's possession, custody or control</i>". In particular, communications between the Claimants <i>inter se</i> and/or between the Claimants and</p>	

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					<p>The State has not attempted to demonstrate how documents that show the Claimants' "<i>understanding of the status of SML 351 following Cabinet Secretary Balala's announcement on 5 August 2013</i>" are relevant to any issue in dispute. Plainly, they are not.</p> <p><u>Materiality</u></p> <p>The State has not demonstrated how the requested documents are relevant. They cannot, therefore, be material to the outcome of the dispute.</p> <p><u>Duplication</u></p>	<p>PAW, which evidence communications between the Claimants and/or PAW and employees or officials of the State would be captured by this request. Those internal communications are not by their nature Documents which ought to be within the possession, custody or control of the State.</p> <p><u>Relevance</u></p> <p>The requested Documents are clearly relevant to the merits case in these proceedings.</p> <p>In particular, the</p>	

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			Reference to Submissions	Comments			
					<p>The State's request is also duplicative of DPRs 46 and 47.</p>	<p>effect of CS Balala's announcement on 5 August 2013, specifically whether SML 351 was revoked or suspended, is a central issue in dispute in this case, which is fundamental to the Claimants' case, and the State's defence on the merits.</p> <p>There is a dispute between the parties as to the status of SML 351 after 5 August 2013, and whether or not SML 351 was expropriated when, on the State's case "[p]ending the Task Force review, the licences subject to</p>	

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						<p><i>review were treated as suspended, but were not cancelled" (State's Counter-Memorial, para. 387). As SML 351 was, on the State's case, only treated as suspended the "Claimants' direct expropriation claim fails, because its fundamental premise - that SML 351 was revoked by the Respondent and nationalised - is incorrect as a matter of fact and law" (State's Counter-Memorial, para. 395).</i></p> <p>The Claimants' submissions indicate that, notwithstanding their claim that there was a</p>	

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						<p>revocation of SML 351, there was a level of uncertainty on the part of the Claimants as to the status of SML 351 subsequent to CS Balala's 5 August 2013 announcement. By way of example, Mr Anderson "<i>was uncertain whether or not SML 351 was subject to the revocation</i>" (Claimants' Memorial, para. 97) and Mr Townsend has also stated that "<i>PAW was unaware of whether CMK's mining licence was affected by the Kenyan Government's announcement</i>"</p>	

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						<p>(CWS-1 Townsend, para. 87). The Claimants state the following in paragraph 97 of their Memorial: "<i>Urgently seeking clarity, Mr Anderson called Commissioner Masibo, who told him that SML 351 had been revoked.</i>" If there were other communications between the Claimants and employees or officials of the State as to the effect of CS Balala's announcement and whether it was in fact revoked or instead merely treated as suspended, these</p>	

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						<p>would be relevant and may be recorded in Documents responsive to this DPR (including in communications passing between the Claimants <i>inter se</i> and/or between the Claimants and PAW). Documents which relate to this key disputed issue as to whether SML 351 was in fact suspended, or instead revoked, and the Claimants' understanding of the effect of SML 351, are highly relevant in understanding the full factual circumstances surrounding the alleged</p>	

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						<p>expropriation at the centre of this case.</p> <p>The Documents would demonstrate the Claimants' understanding of the status of SML 351 following the announcement on 5 August 2013 and will clarify the reasons why the Claimants "<i>chose not to participate in the proceedings of the Task Force at all</i>" (State's Counter-Memorial, para. 431) when the Claimants "<i>together with the other affected licencees were invited to make representations to the Task Force</i>" (State's Counter-Memorial, para.</p>	

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						<p>511). The requested Documents are therefore relevant to the question of whether the State did comply with any requirement of due process (<i>see</i>, State's Counter-Memorial, paras 419-422) and transparency (<i>see</i>, State's Counter-Memorial, paras 507-512).</p> <p><u>Materiality</u></p> <p>As demonstrated above, the requested Documents are relevant to key issues in dispute in these proceedings and therefore, are material to the outcome of this dispute for the</p>	

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						<p>same reasons as under "<i>Relevance</i>" above.</p> <p><u>Duplication</u></p> <p>This DPR is not duplicative of DPR 47. This request is for Documents evidencing communications between "<i>the Claimants and/or PAW, and any employee or official of the Respondent</i>", whereas DPR 47 relates to communications between the Claimants and the Task Force. As stated in the Reply to DPR 46 above, the State no longer pursues DPR 46 on the basis that there is a degree of</p>	

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						overlap with this DPR, as this DPR would also capture internal communications between the Claimants <i>inter se</i> and/or PAW concerning the alleged effect of CS Balala's announcement on 5 August 2013.	
49.	R	Documents evidencing communications between the Claimants <i>inter se</i> and/or PAW relating to the Task Force and/or the decision to commence judicial review proceedings.	Claimants' Memorial, paragraph 105 Exhibit C-147	The documents are relevant and material to the Claimants' understanding of the status of SML 351 following Cabinet Secretary Balala's announcement on 5 August 2013.	In so far as the State's request related to the Task Force, the Claimants will produce such non-privileged documents that are responsive to the State's request, as are located following a reasonable and proportionate search. In so far as the State's request relates	The State notes the Claimants' agreement to produce and fully reserves its position in respect of the objections raised.	In light of the Claimants' undertaking, the Respondent does not seek an order in response to DPR 49. As this request is not pursued, no order is made.

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					<p>to the decision to commence judicial review proceedings, the Claimants object on the following grounds:</p> <p><u>Relevance</u></p> <p>While the existence and contents of CMK's judicial review proceedings are relevant to the case, the State has not offered any explanation for how documents relating to the Claimants' "<i>decision to commence judicial review proceedings</i>" are relevant. The State's failure to refer to its own case or to properly justify this aspect of its DPR is revealing.</p>		

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					<p><u>Materiality</u></p> <p>The State has not demonstrated how the requested documents are relevant. They cannot, therefore, be material to the outcome of the dispute.</p> <p><u>Privilege</u></p> <p>Documents relating to the Claimants' "decision to commence judicial review proceedings" are clearly privileged, as they were created either in contemplation of or during legal proceedings.</p>		
50.	R	Documents evidencing communications between the Claimants <i>inter se</i> and/or PAW and/or any	Claimants' Memorial, paragraph 91 CWS-1, Anderson,	The documents are relevant and material to the allegation that SML 351 was revoked as the	Notwithstanding the fact that the requested documents are self-evidently	The State notes the Claimants' agreement to produce and fully	In light of the Claimants' undertaking, the Respondent does not

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		regulatory authorities in relation to the allegation that Cabinet Secretary Balala solicited a bribe.	paragraph 135 Exhibit C-139	Claimants had refused to pay a bribe allegedly solicited by Cabinet Secretary Balala.	within the possession, custody or control of the State, in the interests of cooperation, the Claimants will produce such non-privileged documents that are responsive to the State's request as are located following a reasonable and proportionate search.	reserves its position in respect of the objections raised.	seek a production order in respect of DPR 50 at this time. As this request is not pursued at this stage, no order is made.
E. Quantum							
51.	R	Documents evidencing communications between Mr Anderson or any of the other Claimants' representatives and Robbie Louw, the CEO of a South African rare earths mining company, and consideration by the Claimants of the development of a mine at	Claimants' Memorial, paragraph 17 CWS-1 Anderson, paragraph 17	The documents are relevant and material to quantum issues in demonstrating the Claimants' alleged due diligence in relation to Mrima Hill and the Claimants' intentions with respect to the duration of their proposed investment in Kenya.	The Tribunal has ordered that there will be a separate quantum phase in this arbitration. The Claimants consider that, given this order, requests for (and production of) documents relevant and material to	The State confirms that it does not seek these Documents in connection with the quantification of loss, and therefore does not maintain the "quantum" limb of the original justification for this request. However,	While DPR 51 strays into the forbidden territory of quantum, it includes a request for documents evidencing communications between the listed persons regarding "the Claimants' intentions with

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		Mrima Hill.			<p>quantum ought be deferred until the quantum phase.</p> <p>The Claimants are of course happy for the State to approach the Claimants' quantum/valuation DPRs (Claimants' DPRs 59-63) in the same way.</p> <p>The Claimants will seek to confer with the State accordingly.</p> <p>The Claimants reserve their right to make objections to this DPR in the event that the State does not agree with the Claimants' proposal for deferral of quantum DPRs.</p>	<p>the State does seek production of the requested Documents in connection with the Claimants' intentions with respect to the duration of their proposed investment in Kenya.</p> <p><u>Relevance and Materiality</u></p> <p>The requested Documents are relevant and material to the outcome of the case, in particular to the jurisdictional issue of whether the Claimants' purported investment falls within the scope of Article 25 of the</p>	<p>respect to the duration of their proposed investment in Kenya”.</p> <p>To the extent documents (or extracts) relate to the issue of duration, and only to that extent, they are to be produced. Irrelevant material is to be redacted. DPR 51 is therefore GRANTED in part.</p>

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						ICSID Convention. One of the requirements of the <i>Salini</i> test is "certain duration of performance", and this DPR will go to establishing whether the purported investments of the Claimants had the necessary duration of performance. The requested Documents will show whether the Claimants intended to hold the purported investment on a long-term basis, and undertake activity " <i>pursuant to the actual rights granted by the purported investment</i> ", which	

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						tribunals have held to be a "key factor in establishing duration" (see, State's Counter-Memorial, para, 328).	
52.	R	Documents evidencing that Mr Townsend "is a highly experienced mining engineer with a track record of running rare earth metal mines and manging mining companies" (Claimants' Memorial, paragraph 53) which enhanced the viability of the Mrima Hill project.	Claimants' Memorial, paragraph 53	The documents are relevant and material to quantum issues in demonstrating the Claimants' ability to develop and operate a viable mine at Mrima Hill.	The Claimants repeat their comments on State DPR 51 above.	<p><u>Scope of document production in this phase of the arbitration</u></p> <p>In our letter to the Claimants' Counsel dated 29 March 2017, the State set out its understanding as to the effect of Procedural Order No. 3 dated 6 June 2016 ("PO3").</p> <p>In particular, PO3 was issued as a result of the State's objection to the Claimants' failure</p>	In the Tribunal's view, the effect of Procedural Order No. 3 dated 6 June 2016 it to defer to a subsequent stage of this proceeding (if such a phase is required) all issues concerning quantum including documents relating to the "alleged fact of profitability of the Mrima Hill project and the extent to which a DCF analysis would be appropriate given the pre-productive stage

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						<p>to quantify their alleged losses in their Memorial of Claim, while purporting to reserve their rights to adduce factual and expert evidence in respect of quantum in due course. Upon the State's application, the Tribunal noted the Claimants' failure to adduce any expert evidence "<i>with respect to the quantification of their alleged loss</i>" (PO3, para. 4) and agreed with the State's proposal that there be a separate "<i>loss of profits phase</i>" (PO3, para. 5). The State's position is that PO3 deferred</p>	<p>of the project". Such issues are integral to the quantum phase and will not be ordered produced during the current phase concerned with jurisdictional objections and the merits.</p> <p>The Tribunal does not accept the Respondent's effort to differentiate between a pure quantum issue and related issues having to do with the method of calculation. If adopted, the Tribunal would likely be in a position of hearing economic evidence initially at the merits proceeding and likely again in the event any subsequent</p>

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						<p>the quantification of the Claimants' alleged loss to a separate phase of the arbitration, should such a separate phase be required and ordered by the Tribunal, but no other issues.</p> <p>In particular, it is the State's position that other issues relating to quantum which the Claimants did plead in their Memorial, such as the alleged fact of profitability and whether a DCF analysis would be appropriate given the pre-productive stage of the project, and which the State responded to in its Counter-Memorial,</p>	<p>quantum phase. Such a procedure would be inefficient and add unnecessary cost to the proceedings, particularly as the quantum phase will not be reached unless the Claimants succeed both in defeating the jurisdictional objections and in achieving success on the merits.</p> <p>DPR 52 is REJECTED.</p>

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						<p>remain to be determined in this phase of the proceedings. The inclusion of such other issues in this phase of the arbitration was not the subject of the State's application which culminated in PO3 nor were such other issues deferred to a separate phase by the terms of PO3.</p> <p>In light of the above, the State confirms that in this phase of the arbitration, the State does not seek (and does not agree to produce) Documents which go solely to the quantification of loss. However, the</p>	

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						<p>State's position is that the parties are required to produce relevant and material Documents which go to other issues, which may relate to quantum, including (but not limited to) Documents relating to the alleged fact of profitability of the Mrima Hill project and the extent to which a DCF analysis would be appropriate given the pre-productive stage of the project.</p> <p><u>Relevance and Materiality</u></p> <p>The requested Documents are relevant and material to the</p>	

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No.	Req. Party	Documents or Category of Documents Requested	Relevance and Materiality According to Requesting Party		Responses/ Objections to Document Request	Reply to Objections to Document Requests	Tribunal's Decision
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						<p>outcome of the case, in particular to establishing the alleged fact of profitability of the Mrima Hill project, as they will evidence the Claimants' ability to develop and operate a viable mine at Mrima Hill.</p> <p><i>As "the project was at such a nascent stage that profitability cannot be demonstrated"</i> (State's Counter-Memorial, para. 553), the requested Documents will be significant in confirming whether the Claimants have <i>"established the fact of profitability"</i> (State's Counter-Memorial, Section</p>	

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						VII, subsection D4).	
53.	R	Documents evidencing communications created by or sent between the Claimants <i>inter se</i> and/or PAW and/or the British Columbia Securities Commission in relation to all regulatory announcements issued by PAW in respect of the Mrima Hill project, including but not limited to, the retraction of the regulatory announcement issued on 2 August 2013.	Claimants' Memorial, paragraph 77 CWS-1 Anderson, paragraphs 115 -116 Respondent's Counter-Memorial, paragraph 144 Exhibit R-062	The documents are relevant and material in demonstrating the Claimants' knowledge of the viability of the Mrima Hill project and to quantum (i.e. the validity of the Claimants' financial projections as to the value of Mrima Hill).	The Claimants repeat their comments on State DPR 51 above.	The State repeats its comments on the " <i>Scope of document production in this phase of the arbitration</i> " in DPR 52 above. <u>Relevance and Materiality</u> The requested Documents are relevant to the alleged viability of the Mrima Hill project and the alleged fact of profitability. As " <i>the project was at such a nascent stage that profitability cannot be demonstrated</i> " (State's Counter-	By reason of P.O. #3, the Tribunal responds to DPR 53 in the same terms as its response to DPR 52. DPR 53 is REJECTED.

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						<p>Memorial, para. 553), the requested Documents will be significant in confirming whether the Claimants have "<i>established the fact of profitability</i>" (State's Counter-Memorial, Section VII, subsection D4).</p> <p>Further, the Documents will help clarify the basis for the statements in PAW's regulatory announcement of 2 August 2013 that "[t]here is no certainty that all or any part of the estimated mineral resource of the Mrima Hill Project will be converted into mineral</p>	

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						<i>reserves" (Exhibit R-62; see, also, State's Counter-Memorial, para. 20) and contribute to establishing whether the Mrima Hill project would indeed have been profitable as the Claimants allege.</i>	
54.	R	Documents evidencing communications with " <i>a consortium of Kenyan investors who wanted to invest in PAW</i> " (Claimants' Memorial, paragraph 70) towards the end of 2012 and communications between the Claimants <i>inter se</i> and/or the PAW in relation thereto.	Claimants' Memorial, paragraph 70 CWS-1 Anderson, paragraph 101	The documents are relevant and material in demonstrating (i) the views of third parties as to the viability of the Mrima Hill project and/or the validity of the licences held by the Claimants and the obstacles to obtaining a mining licence, and (ii) quantum (i.e. the validity of the Claimants' financial projections as to the value of Mrima Hill as assessed by third party potential investors).	The Claimants repeat their comments on State DPR 51 above.	The State repeats its comments on the " <i>Scope of document production in this phase of the arbitration</i> " in DPR 52 above. <u>Relevance and Materiality</u> The requested Documents are relevant and material to the outcome of the	By reason of P.O. #3, the Tribunal responds to DPR 54 in the same terms as its response to DPR 52. DPR 54 is REJECTED.

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No.	Req. Party	Documents or Category of Documents Requested	Relevance and Materiality According to Requesting Party		Responses/ Objections to Document Request	Reply to Objections to Document Requests	Tribunal's Decision
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						<p>case, in particular to establishing the alleged fact of profitability of the Mrima Hill project, by demonstrating the views of third parties as to the viability of the Mrima Hill project and/or the validity of the licences held by the Claimants and the obstacles to obtaining a mining licence.</p> <p>The State refers to its comments on the scope of this phase of the arbitration in DPR 52, and confirms that it does not seek these Documents in connection with the quantification of loss, and therefore does not maintain</p>	

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						<p>limb (ii) of the original justification for this request in this phase of the arbitration. However, the State does seek production of the requested Documents in connection with the alleged fact of profitability.</p> <p>Documents evidencing communications with "<i>a consortium of Kenyan investors who wanted to invest in PAW</i>" (Claimants' Memorial, para. 70) will be significant in deciding the issue of whether the alleged fact of profitability had</p>	

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						been established for the Mrima Hill project by 5 August 2013, as alleged.	
55.	R	Documents evidencing communications with " <i>a number of major potential investors</i> " (Claimants' Memorial, paragraphs 85) after the issuance of SML 351 and communications between the Claimants <i>inter se</i> and/or the PAW in relation thereto.	Claimants' Memorial, paragraphs 85 and 259	The documents are relevant and material in demonstrating (i) the views of third parties as to the viability of the Mrima Hill project and/or the validity of SML 351 and related consents, and (ii) quantum (i.e. the validity of the Claimants' financial projections as to the value of Mrima Hill as assessed by third party potential investors).	The Claimants repeat their comments on State DPR 51 above.	The State repeats its comments on the " <i>Scope of document production in this phase of the arbitration</i> " in DPR 52 and its Reply on " <i>Relevance and Materiality</i> " in DPR 54 above.	By reason of P.O. #3, the Tribunal responds to DPR 55 in the same terms as its response to DPR 52. DPR 55 is REJECTED
56.	R	Documents evidencing communications between the Claimants and/or PAW and: A. TerraSearch (Claimants' Memorial,	Claimants' Memorial, paragraphs 33, 37, 41, 50, 57, 64, 66 and 89 CWS-1 Anderson, paragraph 37	The documents are relevant and material to evidencing the views of third parties as to the viability of the Mrima Hill project and, to quantum (i.e. the validity of the Claimants' financial projections as to the value	The Claimants repeat their comments on State DPR 51 above.	The State repeats its comments on the " <i>Scope of document production in this phase of the arbitration</i> " in DPR 52 above.	By reason of P.O. #3, the Tribunal responds to DPR 56 in the same terms as its response to DPR 52. DPR 56 is

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No.	Req. Party	Documents or Category of Documents Requested	Relevance and Materiality According to Requesting Party		Responses/ Objections to Document Request	Reply to Objections to Document Requests	Tribunal's Decision
			Reference to Submissions	Comments			
		paragraph 41) B. SMS (Claimants' Memorial, paragraph 57) C. Bale (Claimants' Memorial, paragraph 50) D. 5 Capitals (Claimants' Memorial, paragraph 64) E. CRO (Claimants' Memorial, paragraph 64) F. Sigtuna (Claimants' Memorial, paragraph 64) G. Caltrix Consulting (Claimants' Memorial, paragraphs 64 and 65) H. Canon		of Mrima Hill).		<u>Relevance and Materiality</u> The requested Documents are relevant and material to the outcome of the case, in particular to establishing the alleged fact of profitability of the Mrima Hill project, by evidencing the views of third parties as to the viability of the Mrima Hill project. The State refers to its comments on the scope of this phase of the arbitration in DPR 52, and confirms that it does not seek these Documents in connection with the quantification of	REJECTED

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No.	Req. Party	Documents or Category of Documents Requested	Relevance and Materiality According to Requesting Party		Responses/ Objections to Document Request	Reply to Objections to Document Requests	Tribunal's Decision
			Reference to Submissions	Comments			
		<p>(Claimants' Memorial, paragraphs 64 and 65)</p> <p>I. Habitat (Claimants' Memorial, paragraphs 66)</p> <p>J. BMGS (Claimants' Memorial, paragraph 89)</p> <p>K. Mr Saner and Paul Mwadime (Claimants' Memorial, paragraph 33); and</p> <p>L. Mr Said Hussein (Claimants' Memorial, paragraph 37).</p> <p>in relation to the scope of the instructions to the respective experts and their conclusions</p>				<p>loss, and therefore does not maintain the "quantum" limb of the original justification for this request in this phase of the arbitration. However, the State does seek production of the requested Documents in connection with the alleged fact of profitability.</p> <p>In particular, the State's expert disagrees with the Claimants' contention that the Mrima Hill project would have been profitable (<i>see</i>, State's Counter-Memorial, para. 600). Documents evidencing</p>	

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			Reference to Submissions	Comments			
		(including all reports and draft reports and empirical data obtained and/or relied upon) in relation to the Mrima Hill project as well as any communications between the Claimants and/or PAW <i>inter se</i> in relation thereto.				communications between the Claimants and/or PAW and their respective experts would contribute to demonstrating whether these experts had indicated to the Claimants that the project was at an early stage of development and the extent of the commercial viability of the rare earth and niobium deposits at Mrima Hill, and therefore whether their conclusions are consistent with the State's expert's view that "[t]he Claimants have not established the fact of profitability"	

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No.	Req. Party	Documents or Category of Documents Requested	Relevance and Materiality According to Requesting Party		Responses/ Objections to Document Request	Reply to Objections to Document Requests	Tribunal's Decision
			Reference to Submissions	Comments			
						(State's Counter-Memorial, Section VII, subsection D4).	
57.	R	Documents evidencing all metallurgical testwork undertaken by the Claimants on Niobium and rare earth samples from Mrima Hill including details of the laboratories used and their accreditation status.	Claimants' Memorial, paragraphs 261 - 281	The documents are relevant and material in demonstrating the Claimants' knowledge of the viability of the Mrima Hill project and to quantum (i.e. the validity of the Claimants' financial projections as to the value of Mrima Hill).	The Claimants repeat their comments on State DPR 51 above.	The State repeats its comments on the " <i>Scope of document production in this phase of the arbitration</i> " in DPR 52 above. <u>Relevance and Materiality</u> The requested Documents are relevant and material to the outcome of the case, in particular to establishing the alleged fact of profitability of the Mrima Hill project and the alleged viability of the	By reason of P.O. #3, the Tribunal responds to DPR 57 in the same terms as its response to DPR 52. DPR 57 is REJECTED

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No.	Req. Party	Documents or Category of Documents Requested	Relevance and Materiality According to Requesting Party		Responses/ Objections to Document Request	Reply to Objections to Document Requests	Tribunal's Decision
			Reference to Submissions	Comments			
						<p>Mrima Hill project.</p> <p>The State refers to its comments on the scope of this phase of the arbitration in DPR 52, and confirms that it does not seek these Documents in connection with the quantification of loss, and therefore does not maintain the "quantum" limb of the original justification for this request in this phase of the arbitration.</p> <p>However, the State does seek production of the requested Documents in connection with the alleged fact of profitability.</p>	

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No.	Req. Party	Documents or Category of Documents Requested	Relevance and Materiality According to Requesting Party		Responses/ Objections to Document Request	Reply to Objections to Document Requests	Tribunal's Decision
			Reference to Submissions	Comments			
						<p>Documents that evidence "<i>all metallurgical testwork undertaken by the Claimants</i>" will be relevant in determining the extent to which a viable Measured or Indicated resource had in fact been established at Mrima Hill. The Claimants rely on the fact that they had identified significant resources, however the State's expert, Dr Rigby, concluded that:</p> <p><i>"CMK was still a very long way from identifying the scope of Measured and Indicated mineral resources</i></p>	

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No.	Req. Party	Documents or Category of Documents Requested	Relevance and Materiality According to Requesting Party		Responses/ Objections to Document Request	Reply to Objections to Document Requests	Tribunal's Decision
			Reference to Submissions	Comments			
						<p><i>at Mrima Hill. The data relied on by the Claimants relates substantially to Inferred resources. Industry standards do not allow mining companies to rely on Inferred resources as a means of valuing mining assets"</i> (First Expert Report of Dr Rigby, p. 7, para. 13(a)).</p> <p>It is the State's case that the Claimants' assessment of the fact of profitability, which relies on Inferred resources, is highly speculative and incorrect, and the requested Documents will be</p>	

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No.	Req. Party	Documents or Category of Documents Requested	Relevance and Materiality According to Requesting Party		Responses/ Objections to Document Request	Reply to Objections to Document Requests	Tribunal's Decision
			Reference to Submissions	Comments			
						critical to the State proving this contention.	
58.	R	Documents evidencing the instructions to Argonaut in relation to the preparation of a financial model for the Mrima Hill project and a copy of the model in native file and any communications between Argonaut and the Claimants and/or PAW in relation to the same and any communications between the Claimants and/or PAW <i>inter se</i> in relation thereto.	CWS-1 Townsend, paragraph 73	The documents are relevant and material in demonstrating the Claimants' knowledge of the viability of the Mrima Hill project and to quantum (i.e. the validity of the Claimants' financial projections as to the value of Mrima Hill).	The Claimants repeat their comments on State DPR 51 above.	The State repeats its comments on the " <i>Scope of document production in this phase of the arbitration</i> " in DPR 52 above. <u>Relevance and Materiality</u> The requested Documents are relevant and material to the outcome of the case, in particular to establishing the alleged fact of profitability of the Mrima Hill project and the alleged viability of the Mrima Hill project.	By reason of P.O. #3, the Tribunal responds to DPR 58 in the same terms as its response to DPR 52. DPR 58 is REJECTED

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No.	Req. Party	Documents or Category of Documents Requested	Relevance and Materiality According to Requesting Party		Responses/ Objections to Document Request	Reply to Objections to Document Requests	Tribunal's Decision
			Reference to Submissions	Comments			
						<p>The State refers to its comments on the scope of this phase of the arbitration in DPR 52, and confirms that it does not seek these Documents in connection with the quantification of loss, and therefore does not maintain the "quantum" limb of the original justification for this request in this phase of the arbitration. However, the State does seek production of the requested Documents in connection with the alleged fact of profitability. Specifically, the Claimants rely</p>	

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No.	Req. Party	Documents or Category of Documents Requested	Relevance and Materiality According to Requesting Party		Responses/ Objections to Document Request	Reply to Objections to Document Requests	Tribunal's Decision
			Reference to Submissions	Comments			
						<p>upon the financial models, created by Argonaut for PAW, to support their proposition that "<i>it is sufficiently certain that CMK would have made a profit mining Mrima Hill</i>" (Claimants' Memorial, para. 252). However, the State, on the basis of Dr Rigby's expert report, contends that as "<i>the project parameters for a mine at Mrima Hill had not been fixed and there was no mine plan</i>", the Claimants could not have been in a position to establish the commercial viability of the</p>	

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No.	Req. Party	Documents or Category of Documents Requested	Relevance and Materiality According to Requesting Party		Responses/ Objections to Document Request	Reply to Objections to Document Requests	Tribunal's Decision
			Reference to Submissions	Comments			
						mine or estimate costs on a reliable basis (State's Counter-Memorial, para. 621).	
59.	R	Correspondence in relation to the financial models prepared by Mr Townsend (Exhibit C-125) and a copy of the native file of the document produced as Exhibit C-125.	CWS-1 Townsend, paragraph 76.	The documents are relevant and material in demonstrating the Claimants' knowledge of the viability of the Mrima Hill project and to quantum (i.e. the validity of the Claimants' financial projections as to the value of Mrima Hill).	The Claimants repeat their comments on State DPR 51 above.	The State repeats its comments on the " <i>Scope of document production in this phase of the arbitration</i> " in DPR 52 and its Reply on " <i>Relevance and Materiality</i> " in DPR 58 above.	By reason of P.O. #3, the Tribunal responds to DPR 59 in the same terms as its response to DPR 52. DPR 59 is REJECTED
60.	R	Correspondence in relation to the additional financial model prepared by Mr Townsend (Exhibit C-128) and the native file underlying Exhibit C-128.	CWS-1 Townsend, paragraph 83.	The documents are relevant and material in demonstrating the Claimants' knowledge of the viability of the Mrima Hill project and to quantum (i.e. the validity of the Claimants' financial projections as to the value	The Claimants repeat their comments on State DPR 51 above.	The State repeats its comments on the " <i>Scope of document production in this phase of the arbitration</i> " in DPR 52 and its Reply on	By reason of P.O. #3, the Tribunal responds to DPR 60 in the same terms as its response to DPR 52. DPR 60 is

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No.	Req. Party	Documents or Category of Documents Requested	Relevance and Materiality According to Requesting Party		Responses/ Objections to Document Request	Reply to Objections to Document Requests	Tribunal's Decision
			Reference to Submissions	Comments			
				of Mrima Hill).		" <i>Relevance and Materiality</i> " in DPR 58 above.	REJECTED
61.	R	Agreement between PAW, CMK, Mr Anderson and Mr O'Sullivan to acquire 100% of the shares in Cortec UK and Stirling	Claimants' Memorial, paragraph 51 CWS-1 Townsend, paragraph 18	The documents are relevant and material to the Claimants' case that the price paid by PAW for the shares in Cortec UK and Stirling is one of the " <i>key indicators</i> " for valuing the Mrima Hill project.	The Claimants repeat their comments on State DPR 51 above.	The State repeats its comments on the " <i>Scope of document production in this phase of the arbitration</i> " in DPR 52 above. <u>Relevance and Materiality</u> The requested Documents are relevant and material to the outcome of the case, in particular to establishing the alleged fact of profitability of the Mrima Hill project, on the basis of the Claimants' case that the price paid by	By reason of P.O. #3, the Tribunal responds to DPR 61 in the same terms as its response to DPR 52. DPR 61 is REJECTED

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No.	Req. Party	Documents or Category of Documents Requested	Relevance and Materiality According to Requesting Party		Responses/ Objections to Document Request	Reply to Objections to Document Requests	Tribunal's Decision
			Reference to Submissions	Comments			
						<p>PAW for the shares in Cortec UK and Stirling is one of the "key indicators" for valuing the Mrima Hill project.</p> <p>Notably, the Claimants' argue that one of the "key indicators of how far the project had progressed towards development", and consequently whether the Mrima Hill project was at a stage at which the fact of its profitability could be established, was the price paid by PAW for the acquisition of CMK (<i>see</i>, Claimants' Memorial, paras 257-258). However, the Claimants have</p>	

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No.	Req. Party	Documents or Category of Documents Requested	Relevance and Materiality According to Requesting Party		Responses/ Objections to Document Request	Reply to Objections to Document Requests	Tribunal's Decision
			Reference to Submissions	Comments			
						<p>failed to substantiate this contention by producing evidence of the price paid by PAW for CMK.</p> <p>Therefore, the requested Documents are necessary for the State to disprove the Claimants' contention that the "PAW acquisition shows that...the market saw Mrima Hill as being sufficiently developed - and its profitability sufficiently certain" (Claimants' Memorial, para. 258) and confirm that PAW did not in fact treat the Mrima Hill project as a "business</p>	

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No.	Req. Party	Documents or Category of Documents Requested	Relevance and Materiality According to Requesting Party		Responses/ Objections to Document Request	Reply to Objections to Document Requests	Tribunal's Decision
			Reference to Submissions	Comments			
						<i>enterprise, let alone one with demonstrable future earning power" (State's Counter-Memorial, para. 591). The full terms of the acquisition agreement, which has been referred to by the Claimants but not produced, will clarify the terms of the commercial arrangement which may be broader than simply the purchase price on which the Claimants seek to rely.</i>	
62.	R	Amendment agreement to the agreement between PAW and Mr Anderson and Mr O'Sullivan to	CWS-1 Townsend, paragraph 20	The documents are relevant and material to the Claimants' case that the price paid by PAW for the	The Claimants repeat their comments on State DPR 51 above.	The State repeats its comments on the " <i>Scope of document</i>	The Respondent disclaims seeking production of the amendment

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No.	Req. Party	Documents or Category of Documents Requested	Relevance and Materiality According to Requesting Party		Responses/ Objections to Document Request	Reply to Objections to Document Requests	Tribunal's Decision
			Reference to Submissions	Comments			
		acquire 100% of the shares in Cortec UK and Stirling		shares in Cortec UK and Stirling is one of the "key indicators" for valuing the Mrima Hill project.		<i>production in this phase of the arbitration</i> in DPR 52 and its Reply on "Relevance and Materiality" in DPR 61 above.	agreement in respect of its <i>ratione personae</i> argument but wishes to have it produced in relation to the "key indicators for valuing the Mrima Hill project". As such its production is not to be required at this stage, for the reasons in DPR 52 above. DPR 62 is REJECTED
63.	R	Documents evidencing the valuation calculations and/or methodology which underpinned the price paid by PAW for the shares in Cortec UK and Stirling.	Claimants' Memorial, paragraphs 257 - 258	The documents are relevant and material to the Claimants' case that the price paid by PAW for the shares in Cortec UK and Stirling is one of the "key indicators" for valuing the Mrima Hill project.	The Claimants repeat their comments on State DPR 51 above.	The State repeats its comments on the "Scope of document production in this phase of the arbitration" in DPR 52 and its Reply on "Relevance and	DPR 63 is dismissed for the reasons given in DPR 52 above. DPR 63 is REJECTED

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No.	Req. Party	Documents or Category of Documents Requested	Relevance and Materiality According to Requesting Party		Responses/ Objections to Document Request	Reply to Objections to Document Requests	Tribunal's Decision
			Reference to Submissions	Comments			
						<i>Materiality</i> " in DPR 61 above.	
64.	R	Bank statements of the Claimants from 1 January 2007 to 31 December 2016.	Claimants' Memorial, paragraph 146 Claimants' Counter-Memorial, paragraph 170 Respondent's Counter-Memorial, paragraph 312	These documents are relevant and material to establishing (i) the timing and amounts the Claimants allege to have spent on the Mrima Hill project (ii) the source of the funds, and (iii) the timing and source of the loans which are shown in the annual accounts of Cortec UK and Stirling	The Claimants repeat their comments on State DPR 51 above.	<u>Relevance and Materiality</u> The requested Documents are relevant and material to the outcome of the case, in particular to jurisdictional issues such as establishing the true source of funds of the Claimants and the satisfaction of the <i>Salini</i> criteria. In particular, in order for the Tribunal to be vested with jurisdiction <i>ratione materiae</i> , the Claimants must show that they	DPR 64 is allowed to the extent (only) of documentation of the alleged investment relied upon by the Claimants. DPR 64 is GRANTED in part.

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No.	Req. Party	Documents or Category of Documents Requested	Relevance and Materiality According to Requesting Party		Responses/ Objections to Document Request	Reply to Objections to Document Requests	Tribunal's Decision
			Reference to Submissions	Comments			
						<p>made a substantial contribution using their own financial means. The State contends that the Claimants cannot satisfy that requirement (see, State's Counter-Memorial, paras 292-293).</p> <p>In response to the State's contention, the Claimants entirely fail to address the position that the majority of funds came from PAW, Mr O'Sullivan and Mr Anderson. Instead, the Claimants focus principally on the legal authorities cited by the State. Therefore, this DPR is critical to the State being able</p>	

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No.	Req. Party	Documents or Category of Documents Requested	Relevance and Materiality According to Requesting Party		Responses/ Objections to Document Request	Reply to Objections to Document Requests	Tribunal's Decision
			Reference to Submissions	Comments			
						to further substantiate its jurisdictional objection, specifically in proving the true source of the capital contributions allegedly made by the Claimants, in its Reply on Preliminary Objections.	
65.	R	Cortec UK's financial statements for the years ended March 2012 and March 2016.	Claimants' Memorial, paragraph 146 Claimants' Counter-Memorial, paragraph 170 Respondent's Counter-Memorial, paragraph 312	These documents are relevant and material to establishing (i) the timing and amounts the Claimants allege to have spent on the Mrima Hill project, (ii) the source of the funds, and (iii) the timing and source of the loans which are shown in the annual accounts of Cortec UK and Stirling.	The Claimants repeat their comments on State DPR 51 above.	The State repeats its Reply on "Relevance and Materiality" in DPR 64 above.	Same disposition as DPR 64. DPR 65 is GRANTED in part.
66.	R	Stirling's financial	Claimants' Memorial,	These documents are	The Claimants repeat	The State repeats	Same disposition as

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No.	Req. Party	Documents or Category of Documents Requested	Relevance and Materiality According to Requesting Party		Responses/ Objections to Document Request	Reply to Objections to Document Requests	Tribunal's Decision
			Reference to Submissions	Comments			
		statements for the years ended April 2008, December 2013 and December 2015.	paragraph 146 Claimants' Counter-Memorial, paragraph 170 Respondent's Counter-Memorial, paragraph 312	relevant and material to establishing (i) the timing and amounts the Claimants allege to have spent on the Mrima Hill project, (ii) the source of the funds, and (iii) the timing and source of the loans which are shown in the annual accounts of Cortec UK and Stirling.	their comments on State DPR 51 above.	its Reply on "Relevance and Materiality" in DPR 64 above.	DPR 64. DPR 66 is GRANTED in part.
67.	R	Documents evidencing the source of the loan to Cortec UK shown in Cortec UK's financial statements as "creditors".	Exhibits R-90, R-91 and C-98	These documents are relevant and material to establishing the timing and source of the loan which is shown in the annual accounts of Cortec UK.	The Claimants repeat their comments on State DPR 51 above.	The State repeats its Reply on "Relevance and Materiality" in DPR 64 above.	The "source of the loan to Cortec UK" is relevant to the Respondent's challenge to the investment and the Tribunal's jurisdiction <i>materiae personae</i> . DPR 67 is GRANTED.
68.	R	Documents evidencing the source of the loan to Stirling shown in Stirling's financial statements as	Exhibit R-97	These documents are relevant and material to establishing the timing and source of the loan which is shown in the annual	The Claimants repeat their comments on State DPR 51 above.	The State repeats its Reply on "Relevance and Materiality" in	The solution follows the same reasons as the reasons given in DPR 67.

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No.	Req. Party	Documents or Category of Documents Requested	Relevance and Materiality According to Requesting Party		Responses/ Objections to Document Request	Reply to Objections to Document Requests	Tribunal's Decision
			Reference to Submissions	Comments			
		"creditors".		accounts of Stirling.		DPR 64 above.	DPR 68 is GRANTED.
69.	R	Documents evidencing the transfer of the CMK loan from Cortec UK to Mr Anderson in 2012.	Respondent's Counter-Memorial, paragraph 312 Exhibit C-98	These documents are relevant and material to establishing the timing and source of the loan which is shown in the annual accounts of Cortec UK.	The Claimants repeat their comments on State DPR 51 above.	The State repeats its Reply on "Relevance and Materiality" in DPR 64 above.	The solution follows the same reasons as the reasons given in DPR 67. DPR 69 is GRANTED.
70.	R	Documents evidencing the transfer of the CMK loan from Stirling to Mr O'Sullivan in 2012.	Respondent's Counter-Memorial, paragraph 312	These documents are relevant and material to establishing the timing and source of the loan which is shown in the annual accounts of Stirling.	The Claimants repeat their comments on State DPR 51 above.	The State repeats its Reply on "Relevance and Materiality" in DPR 64 above.	These documents are probative for the reasons given in DPR 67. DPR70 is GRANTED.
71.	R	Documents evidencing communications between the Claimants and Chippy Shaik in relation to Mrima Hill and/or the Claimants' purported investment in Kenya.	CWS-1 Anderson, paragraph 50	The documents are relevant and material to demonstrating the Claimants' commercial intentions with respect to the Mrima Hill project and whether in fact the Claimants intended to hold a long-term investment in	The Claimants repeat their comments on State DPR 51 above.	The State repeats its Reply on "Relevance and Materiality" in DPR 51 above.	Only extracts of documents evidencing whether Claimants intended a long term investment (or not) are relevant. DPR 71 is GRANTED in part.

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No.	Req. Party	Documents or Category of Documents Requested	Relevance and Materiality According to Requesting Party		Responses/ Objections to Document Request	Reply to Objections to Document Requests	Tribunal's Decision
			Reference to Submissions	Comments			
				Kenya.			
72.	R	Invoices addressed to the Claimants and/or PAW relating to expenditure in relation to the Mrima Hill project and evidence of payment of the same.	Claimants' Counter-Memorial, paragraph 272 Exhibits C-55, C-64 and C-245	These documents are relevant and material to establishing the timing and amounts the Claimants allege to have spent on the Mrima Hill project.	The Claimants repeat their comments on State DPR 51 above.	The State repeats its comments on the " <i>Scope of document production in this phase of the arbitration</i> " in DPR 52 and its Reply on " <i>Relevance and Materiality</i> " in DPR 64 above.	The request is excessive and the request for all invoices unduly burdensome. DPR 72 is REJECTED.
73.	R	Documents evidencing <i>projected</i> amounts to be spent by the Claimants and/or PAW in respect of the Mrima Hill project.	Claimants' Memorial, paragraph 49	These documents are relevant and material to establishing the financial contribution the Claimants and/or PAW intended to make in respect of the Mrima Hill project.	The Claimants repeat their comments on State DPR 51 above.	The State refers to its comments on the " <i>Scope of document production in this phase of the arbitration</i> " in DPR 52, and it confirms that it does not intend to pursue this DPR in this phase of the arbitration, as the	Documents regarding <i>projected</i> expenditures are not material. DPR 73 is REJECTED.

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No.	Req. Party	Documents or Category of Documents Requested	Relevance and Materiality According to Requesting Party		Responses/ Objections to Document Request	Reply to Objections to Document Requests	Tribunal's Decision
			Reference to Submissions	Comments			
						requested Documents principally relate to the quantification of the Claimants' alleged loss.	
74.	R	Documents evidencing the alleged intellectual property rights held by the Claimants " <i>generated and applied in furtherance of the Mrima Hill project</i> ". (Claimants' Memorial, paragraph 133(f))	Claimants' Memorial, paragraph 133(f)	These documents are relevant and material to quantum.	The Claimants repeat their comments on State DPR 51 above.	<u>Relevance and Materiality</u> The State refers to its comments on the " <i>Scope of document production in this phase of the arbitration</i> " in DPR 52, and confirms that it does not seek these Documents in connection with the quantification of loss. However, the requested Documents are relevant and	These documents are not probative of any live issue at this stage. DPR 73 is REJECTED.

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No.	Req. Party	Documents or Category of Documents Requested	Relevance and Materiality According to Requesting Party		Responses/ Objections to Document Request	Reply to Objections to Document Requests	Tribunal's Decision
			Reference to Submissions	Comments			
						<p>material to the Tribunal's jurisdiction <i>ratione materiae</i>, in particular as to whether the Claimants have demonstrated that their alleged intellectual property rights are capable of being investments under the BIT (<i>see</i>, State's Counter-Memorial, para. 19.1.3). Further, the Claimants plead that their alleged intellectual property rights are "investments" under the BIT, however provide no evidence of the existence of, or the owners of, the alleged intellectual</p>	

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No.	Req. Party	Documents or Category of Documents Requested	Relevance and Materiality According to Requesting Party		Responses/ Objections to Document Request	Reply to Objections to Document Requests	Tribunal's Decision
			Reference to Submissions	Comments			
						<p>property rights (Claimants' Memorial, para. 133(f)).</p> <p>The requested Documents are also relevant and material to the State's contention that there was no indirect expropriation of the alleged intellectual property rights (as asserted by the Claimants at paragraph 175 of their Memorial), as the Claimants have failed to demonstrate that any intellectual property rights capable of expropriation were created, or if they were created, that the Claimants had</p>	

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No.	Req. Party	Documents or Category of Documents Requested	Relevance and Materiality According to Requesting Party		Responses/ Objections to Document Request	Reply to Objections to Document Requests	Tribunal's Decision
			Reference to Submissions	Comments			
						and/or retained a proprietary interest in the alleged rights (State's Counter-Memorial, para. 444.2).	
75.	R	Documents relating to the Venmyn Deloitte Report (Exhibit C-126), including instructions provided to Venmyn Deloitte and all communications and data (including financial models) underlying the report.	Claimants' Memorial, paragraph 250 CWS-1 Townsend, paragraph 80	The documents are relevant and material in demonstrating the Claimants' knowledge of the viability of the Mrima Hill project and to quantum (i.e. the validity of the Claimants' financial projections as to the value of Mrima Hill).	The Claimants repeat their comments on State DPR 51 above.	The State refers to its comments on the " <i>Scope of document production in this phase of the arbitration</i> " in DPR 52, and confirms that it does not seek these Documents in connection with the quantification of loss, and therefore does not maintain the "quantum" limb of the original justification for this request in this phase of the arbitration.	Productions of documents relating to the Venmyn Deloitte report (Exhibit C-126) are not relevant at this stage. DPR 75 is REJECTED.

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No.	Req. Party	Documents or Category of Documents Requested	Relevance and Materiality According to Requesting Party		Responses/ Objections to Document Request	Reply to Objections to Document Requests	Tribunal's Decision
			Reference to Submissions	Comments			
						<p><u>Relevance and Materiality</u></p> <p>The requested Documents are relevant to the alleged viability of the Mrima Hill project and the alleged fact of profitability. As <i>"the project was at such a nascent stage that profitability cannot be demonstrated"</i> (State's Counter-Memorial, para. 553), the requested Documents will be significant in confirming whether the Claimants have <i>"established the fact of profitability"</i> (State's Counter-Memorial, Section VII, subsection</p>	

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No.	Req. Party	Documents or Category of Documents Requested	Relevance and Materiality According to Requesting Party		Responses/ Objections to Document Request	Reply to Objections to Document Requests	Tribunal's Decision
			Reference to Submissions	Comments			
						D4).	
76.	R	Documents evidencing the Claimants' assessment of the resources at Mrima Hill was NI 43-101 compliant and evidence of the appropriate accreditation.	Claimants' Memorial, paragraphs 261 - 281	The documents are relevant and material in demonstrating the Claimants' knowledge of the viability of the Mrima Hill project and to quantum (i.e. the validity of the Claimants' financial projections as to the value of Mrima Hill).	The Claimants repeat their comments on State DPR 51 above.	The State repeats its comments on the " <i>Scope of document production in this phase of the arbitration</i> " in DPR 52 and confirms that it does not seek these Documents in connection with the quantification of loss, and therefore does not maintain the "quantum" limb of the original justification for this request in this phase of the arbitration. The State also repeats its Reply on " <i>Relevance and Materiality</i> " in	These documents in the view of the Tribunal would only be (potentially) relevant at a quantum stage. DPR 76 is REJECTED.

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No.	Req. Party	Documents or Category of Documents Requested	Relevance and Materiality According to Requesting Party		Responses/ Objections to Document Request	Reply to Objections to Document Requests	Tribunal's Decision
			Reference to Submissions	Comments			
						DPR 57 above. Further to the reasoning at DPR 57 above, the Claimants have not, so far, substantiated their claim that they obtained an NI 43-101 compliant assessment of the mineral resources at Mrima Hill (Claimants' Memorial, para. 270).	
F. Other							
77.	R	Native files with the original metadata intact for the following documents already produced by the Claimants: i. Register of Members	Exhibits C-23, C-75, C-101, C-102, C-103, C-238 and C-251	These documents are relevant and material to verifying the authenticity of certain documents produced by the Claimants.	The State has not raised any issue with the authenticity of the documents for which it is seeking original native files with metadata. The requested documents are not therefore relevant and/or	The State notes the Claimants' objections to this DPR. The State fully reserves its position in respect of those objections but, in the interests of cooperation, confirms that it	The Respondent notes the objection of the Claimants and confirms that the Respondent does not intend to proceed with this DPR.

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No.	Req. Party	Documents or Category of Documents Requested	Relevance and Materiality According to Requesting Party		Responses/ Objections to Document Request	Reply to Objections to Document Requests	Tribunal's Decision
			Reference to Submissions	Comments			
		(Exhibit C-23); ii. Notes prepared by Mr Anderson from meeting with government officials on 6 March 2013 (Exhibits C-75); iii. Statement of Mr Anderson on meetings held on 11 and 13 February 2013 (Exhibit C-101); iv. Notes prepared by Mr O'Sullivan dated 20 February 2014 (Exhibit C-102); v. Notes prepared by Mr Anderson of meeting with Senator Boy on 20 February 2014 (Exhibit C-103); vi. Minutes of			material to any issue in dispute. The State's request is also unreasonably burdensome. The Claimants refer to Article 3(12)(b) of the IBA Rules which states that: <i>"Documents that a Party maintains in electronic form shall be submitted or produced in the form most convenient or economical to it that is reasonably usable by the recipients, unless the Parties agree otherwise or, in the absence of such agreement, the Arbitral Tribunal decides otherwise".</i> Further, as noted in a recent book on document production	does not intend to pursue this DPR.	As this request is not pursued, no order is made.

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			Reference to Submissions	Comments			
		<p>meeting with NEMA held on 11 January 2013 (Exhibit C-238); and</p> <p>vii. List of plots (Exhibit C-251).</p>			<p>in international arbitration:</p> <p><i>"Usually, the important information is included in the document itself. If the requesting party aims to obtain the original e-documents that include metadata, it must describe the relevance and the materiality of the meta data.</i></p> <p><i>[...] circumstances [where metadata is material] are rather extraordinary in international arbitration. In general, the inconveniences of the production of metadata prevail. The analysis of</i></p>		

1	2	3	4		5	6	7
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			Reference to Submissions	Comments			
					<i>metadata is time-consuming and unduly increases the total amount of time and money spent on document production. In view of the efficiency of proceedings the production of metadata should remain the exception".⁴⁹</i>		

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⁴⁹ See R Marghitola, *Document Production in International Arbitration* (Kluwer, 2015) pp.59-60.